tend to expedite or facilitate the disposition of the proceeding.

(b) In its discretion, the Board or a single presiding member may permit oral argument in any proceeding. The Board or the presiding member shall prescribe the time and place for argument and the time allocated for argument. A petitioner wishing to make oral argument should make the request therefor in the petition.

§ 8.17 Decision of the Board.

(a) Unless the petitioner consents to disposition by a single member, decisions of the Board shall be by majority vote.

(b) Where petitioner consents to disposition by a single member, other interested parties shall have an opportunity to oppose such disposition, and such opposition shall be taken into consideration by the Board in determining whether the decision shall be by a single member or majority vote.

§ 8.18 Public information.

Subject to the provisions of Part 70 of this title, all papers and documents made a part of the official record in the proceedings of the Board and decisions of the Board shall be made available for public inspection during usual business hours at the Office of the Board of Service Contract Appeals, U.S. Department of Labor, Washington, D.C. 20210.

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August 14, 1981

Part VII

Department of Labor

Wage and Hour Division, Employment Standards Administration

Procedures for Predetermination of Wage Rates

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 1

Procedures for Predetermination of Wage Rates

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document is a proposal resulting from the Administration's reexamination of the procedures in Part 1 for predetermination of wage rates under the Davis-Bacon and Related Acts. Major changes are proposed to amend the procedure for the determination of prevailing wage rates and the provisions for the issuance of semi-skilled classifications on wage determinations.

DATE: Comments (three copies) must be received on or before October 13, 1981.

ADDRESS: Submit comments to Mr. William M. Otter, Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, D.C. 20210. Phone: (202) 523–8305.

FOR FURTHER INFORMATION CONTACT: Mr. William M. Otter, Administrator, Wage and Hour Division, Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, D.C. 20210. Phone (202) 523–8305.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a proposal was published in the **Federal Register** (44 FR 77026) to make certain revisions to 29 CFR Part 1, Procedures for Predetermination of Wage Rates under the Davis-Bacon and Related Acts. As stated in the proposal, its purpose was to reexamine and revise the procedures in Part 1 for predetermination of wage rates under the Davis-Bacon and Related Acts.

Interested persons were afforded the opportunity to submit comments to the Wage and Hour Division on or before March 17, 1980. Subsequently, on February 15 and April 1, 1980, notice was given in the **Federal Register** extending the dates for submission of comments to March 27 and May 27, 1980, respectively.

On January 16, 1981, this regulation was published in the **Federal Register** (46 FR 4306) as a final rule with a scheduled effective date of February 17, 1981. However, pursuant to the President's Memorandum of January 29, 1981, the Department published a notice on February 6, 1981 (46 FR 11253), delaying implementation of this regulation until March 30, 1981. The Department subsequently delayed the implementation of this regulation until August 15, 1981 in order to fully reconsider the rule as required by Executive Order 12291. See 46 FR 18973 (March 27, 1981); 46 FR 23739 (April 28, 1981); 46 FR 33514 (June 30, 1981); and 46 FR 36140 (July 14, 1981).

During this period, the Department conducted a thorough review of this regulation, which is being postponed by separate document until action is taken on this proposal. The proposed changes to the previously published rule contained in this document are intended to implement the regulatory objective of issuing wage determinations which accurately reflect locally prevailing wages. It has been concluded, in accordance with Executive Order 12291, that the proposed changes are the most cost effective alternative consistent with the purpose of the statute.

The regulations proposed today would not appear to require a regulatory impact analysis under the Executive Order since these changes will result in substantial cost savings annually for both contractors and the government while still assuring protection of local wage rates and practices. Because of the importance to the government and the public of the issues involved, the Department has, nevertheless, concluded that the regulation should be deemed a "major" rule for purposes of Executive Order 12291. The Department's initial regulatory impact analysis and the initial regulatory flexibility analysis assessing the impact of the proposed changes on small entities, as required by the Regulatory Flexibility Act, are summarized after the discussion below of the proposed changes.

It is proposed to modify section 1.2(a) to revise the method of determining "prevailing wages". This section would define the "prevailing rate" as the single rate paid to a majority of workers in a particular classification on similar construction in the locality or the average rate if no single rate is paid to a majority.

This change is proposed because the existing regulation adopting a rate paid to as few as 30 percent of the workers in a classification ignores the rate paid to up to 70 percent of the workers, which may be less (or more) than the 30 percent rate. Likewise, defining the prevailing rate as only the average rate was considered and rejected because the term "prevailing" contemplates the most widely paid rate as a definition of first choice.

Sections 1.3(a) and 1.3(b)(4) would be modified to recognize that although data from Federal and State agencies may be important in individual cases, such agency data are not generally a primary source of information.

The Department is also considering excluding projects subject to Davis-Bacon wage determinations from its surveys, provided that it is feasible to do so. Accordingly, comments are solicited on whether the regulations should be amended to provide for exclusion of Federal projects with attention to the feasibility of differentiating such projects in surveys, the feasibility of determining prevailing wages for categories of construction which are wholly or largely Federally financed if such projects are excluded, and the feasibility of differentiating projects where the contractor would otherwise have paid the wages contained in the wage determination.

Section 1.6(a)(1) would be modified to extend the expiration date of project wage determinations from 120 days to 180 days after issuance to ease the problem of wage determinations expiring after bid opening but before contract award, which frequently necessitates recompetition and substantial delays in prosecution of the project.

Section 1.6(b) would clarify the Department's position that Appendix C, which contains guidelines for the application of wage determinations to projects, is advisory in nature, and that due consideration is to be given to area practice. Corresponding changes were made in Appendix C.

Section 1.6(f) would continue to require the agency to either terminate and resolicit or to incorporate a valid wage determination in the contract after award under the circumstances outlined. However, under this proposal, the requirement that a wage determination be incorporated after contract award would be limited to circumstances where the contractor will receive an appropriate adjustment in compensation if there are any increased costs resulting from incorporation of a valid wage determination. The regulation would further provide that the method of incorporation of the valid wage determination and adjustment in compensation where necessary should not be contrary to procurement regulations and statute.

After carefully reviewing this matter, it was decided that continuation of the requirement for insertion of a correct wage determination was proper under the circumstances outlined in § 1.6(f), namely, where no wage determination

has been included in the contract or where a clearly inapplicable wage determination has been incorporated from the **Federal Register** or issued and applied because DOL was incorrectly advised as to the nature of the project or its location. However, even under these circumstances, the Department believes that it would be inequitable to apply the regulation if the contractor would be harmed because of Government error. Of course, the procuring agencies should not be required to take any action which would be contrary to procurement law.

Section 1.7(b) would be revised to strictly prohibit the use of wage survey data obtained from a metropolitan area in issuing a wage determination for a rural area, and vice versa. This change is being proposed to clarify the Department's position that it is not appropriate to use wage data from demographically dissimilar counties due to the usual disparity between wages traditionally paid in rural areas and metropolitan areas.

Section 1.7(d) is proposed to be revised to allow for the issuance of helper classifications on wage determinations when the classification is identifiable in the locality. Implementation of this proposal would provide recognition of a widespread practice in the construction industry and thus allow wage determinations to reflect actual classification practices and rates. A corresponding change is proposed in Part 5 to permit conformance of helpers where the classification is used in the area.

Summary of Preliminary Regulatory Impact and Regulatory Flexibility Analysis

The Department has prepared its preliminary regulatory impact analysis to identify and quantify the cost impact of the proposed changes and various alternatives that were explored and to inform the public of the economic considerations behind these proposed revisions in accordance with Executive Order 12291.

The new proposal must also consider the Regulatory Flexibility Act of 1980. This Act requires agencies to prepare regulatory flexibility analyses and to develop flexible alternatives whenever possible in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The analysis summarized below meets the requirements set forth for assessing the economic impact of the proposed changes in the Davis-Bacon regulations on small entities as required under the Regulatory Flexibility Act.

A. *Definition of "prevailing" rate.* The existing regulations define the "prevailing" rate as the rate paid to the majority of the employees in a classification; or if there is no majority, the rate paid to the greatest number, provided it constitutes at least *30 percent* of the employees in the classification; or if no single rate is paid to at least 30 percent of the employees, the *average* rate.

The proposed regulation would revise the method of determining Davis-Bacon rates. It would define the "prevailing" rate as the single rate paid to a majority of workers in a particular classification on similar construction in the locality, or the average rate if no single rate is paid to a majority. The Department believes that the proposed definition is most consistent with the "prevailing wage" concept contemplated in the legislation under which rates are designed to mirror, to the extent possible, those customarily paid in appropriate labor markets. If adopted, the proposed elimination of the 30 percent rule is expected to result in substantial cost savings on Government construction contracts amounting to at least $120 million in fiscal year 1982 alone.

The Department also considered defining the "prevailing" rate as the average in all cases. This alternative was not selected because the term "prevailing" contemplates the most widely paid rate as a definition of first choice.

Several other alternatives were also considered including (1) setting wage determinations at some percentage of the average rate; (2) issuing wage rate determinations as a range of wage rates reflecting the actual distribution of wages in a locality; and (3) allowing procurement agencies to set rates based on—rather than identical to—DOL determinations (the decoupling approach). The Department has carefully considered these options, but concluded that they would not be consistent with the statute's intent.

The DOL methodology estimates the change in wage costs under different decision rules by comparing a large sample of 1,170 Davis-Bacon craft determinations in effect in 1981 with average wage rates for those crafts and localities derived from field surveys conducted by the Employment Standards Administration (ESA). Our sample covered nine crafts and three types of construction (i.e., building, highway and heavy and residential) across all regions of the country.

Because we know the decision rule actually used in setting each Davis-Bacon determination in the sample and the wage rates paid workers in geographic areas, the impact on Davis-Bacon rates of any change in administrative procedures can be readily determined. For example, to evaluate the percentage change expected in Davis-Bacon rates associated with dropping the 30 percent rule, all determinations in the sample based on this rule were compared with their corresponding average rates to calculate the percent differences in the Davis-Bacon rates. For those determinations based on the majority or average rule, the percent differences were set at zero.

However, many Davis-Bacon determinations are not based on comprehensive wage surveys but rather on collective bargaining agreements or state surveys. Hence, results based solely on the sample will be biased if there is a higher frequency of determinations based on the 30 percent rule in non-surveyed areas. Clearly, average rates cannot be issued without a wage survey; hence, it is likely that Davis-Bacon determinations are implicitly based more frequently on the 30 percent rule in non-surveyed areas.

To adjust our estimates for this possible sample bias, we used both survey data and independent sources to construct estimates of percent differences for all areas lacking surveys. For example, in large urban areas where wage determinations are based on collective bargaining agreements, information on the percentage of workers who are unionized in the area was used to determine the impact of using the majority rule or the average. Where the extent of unionization was sufficiently high, current rates could be expected to prevail even in the absence of the 30 percent rule. We, therefore, assumed that there would be no change in Davis-Bacon rates. Otherwise, we used estimates of percent changes from Davis-Bacon rates to average rates derived from a CEA study of less unionized urban areas.

With estimates in hand for each county, we then summed the percentage differences for each type of construction across all geographic areas (both rural and urban) based on their relative contribution to total public construction activity. This resulted in three seperate estimates of the expected percentage change in Davis-Bacon wage rates from adopting different administrative procedures, one for each construction sector.

The final step involves matching these percent changes in wages to estimates of the total labor costs expected to be covered by Davis-Bacon in fiscal year 1982 for each type of construction. We then added up the separate labor cost savings estimates for each construction

sector to form our final estimate of the aggregate wage cost savings from alternative wage determination rules. The preliminary regulatory impact analysis describes the methodology in further detail.

This methodology was used to estimate the cost impact of dropping the 30 percent rule and of using the average rule in all cases. This procedure produced cost savings ranging from $68 million to $173 million from eliminating the 30 percent rule. The average cost savings in this range is around $120 million. The corresponding estimates of cost savings from switching to an average rule in all cases range from $127 million to $288 million, with average cost savings set at $210 million.

This methodology could not be applied to estimate the cost impact of most other alternatives under consideration because of the absence of independent data on which to calculate the differences in wages resulting from these other options for non-surveyed areas. Also, and perhaps more importantly, this methodology measures only the changes in Davis-Bacon rates, not actual changes in wage rates paid on Davis-Bacon projects. The further one moves the Davis-Bacon minimum below the average, the less reflective it is of actual prevailing wages and hence of the real cost savings to be anticipated.

However, we did develop a crude estimate of the potential cost savings from the alternative calling for a range of wages rather than a single rate, for each determination in a locality using our methodology and the results of a CEA study which estimated the net impact of setting minimum wages on Davis-Bacon projects. This estimate is similar to the alternative that establishes a range of wage rates, since the lowest rate in the range effectively becomes the Davis-Bacon minimum. This procedure produced cost savings estimates ranging from $505.3 million to $631 million with a midpoint estimate of $568.2 million for this option.

Much of these cost savings would be passed on to small contractors. The Census Bureau's Economic Census of Construction shows that in 1977 there were 53,665 construction establishments with fewer than 20 employees involved in construction work. These small contractors accounted for about 56 percent of all such construction establishments, but only about 17 percent of employment. While we could use relative employment percentages to distribute the total cost savings from adopting alternative wage determination procedures among large and small contractors, this would be inappropriate since smaller contractors are more likely to pay wages normally below Davis-Bacon rates, resulting in relatively larger cost savings for small contractors from any lowering in Davis-Bacon rates. Although we can not develop numerical cost estimates, the expected cost savings would be expected to be substantial.

While our approach provides a reasonable approximation of the wage cost savings expected to result from the proposed regulation, it should be stressed that they are only a proxy for actual construction *cost* differences. Nevertheless, these wage estimates are a useful indicator of the order of magnitude of the lower construction costs that may be expected from the proposed change in the definition of prevailing wages.

B. *Cost Impact of the Expanded Issuance of Semi-Skilled Classifications.* The Department has long permitted exceptions from predetermined Davis-Bacon rates set for a craft classification for apprentices and trainees who are in approved programs. The Department has also recognized a helper classification in some areas under certain well-defined situations where (1) it constitutes a separate and distinct class of workers (i.e., the scope of duties of the helper is defined and can be differentiated from journeyman duties); (2) the particular helper classification prevails in the area; and (3) the helper is not used as an informal apprentice or trainee.

During its review, the Department concluded that the current regulations regarding semi-skilled crafts do not adequately reflect local practices in the construction industry, in particular, the widespread use of helpers to perform certain craft tasks. For example, the 1976–1977 BLS survey of large metropolitan areas found that among non-union construction firms, the ratio of helpers to journeymen ranged from .35 for carpenters to .86 for bricklayers. The wage differences were also large—the average wage of helpers ranged from 58 percent (bricklayers) to 68 percent (carpenters) of that of journeymen.

The proposed regulation would expand the use of nonjourneymen in Davis-Bacon construction by issuing helper classifications on all wage determinations when they can be identified in the locality and by permitting conformance of helpers. Helpers would be broadly defined in the regulation, and permitted in a ratio of one helper to five journeymen. These changes should result in substantial cost savings by allowing contractors increased flexibility in their work assignments to use less-costly semi-skilled workers instead of journeymen.

The precise impact of the proposed changes on construction costs cannot be estimated with available data. Most importantly, while information exists on the relative wages of journeymen and helpers, there is no corresponding data on their relative productivities with which to measure the change in labor costs. As a result, we must again use wage differences to proxy these construction cost differences.

The Department used a different approach to estimate the wage impact of eliminating current restrictions on the issuance of helper rates. In order to calculate the potential wage savings, we tried to predict how the proposed revisions would alter the relative demand for helpers (in place of journeymen). The estimated additional number of helpers expected on Davis-Bacon projects was multiplied by an estimate of the difference in wages paid helpers and journeymen and average hours worked annually (1535 hours) in the construction industry to derive an estimate of the aggregate wage savings.

To derive an estimate of the mix of helpers and journeymen we assumed that once the current restrictions are lifted, the ratio of helpers to journeymen on Davis-Bacon construction projects would be identical to that found overall in construction (excluding single-family residential construction). Several estimates of this ratio are available from various published sources. We used a ratio derived from BLS survey data of large metropolitan areas indicating that one helper is hired for every seventeen journeymen. However, since this particular sample is heavily unionized (in the union sector, relatively fewer helpers are utilized), we also used a 1:10 ratio as an alternative estimate.

These ratios help us calculate the additional helpers expected. Applying these ratios to the universe of current journeymen on Davis-Bacon projects (estimated at 651,000) would indicate about 38,409 (or alternatively 65,100) additional helpers on such construction, under the proposed changes. Our estimates of the resulting cost savings from increased recognition of helpers were obtained by multiplying the number of additional helpers by the average hours worked in a year (1535) and various estimates of the wage differential between helpers and journeymen from available sources. The estimated cost savings assuming a 1:17 ratio range from about $203 million to nearly $410 million. With the lower 1:10 ratio, the corresponding estimates range as high as $695 million. The average estimate based on these ranges is about $450 million.

C. *Summary.* The proposed revisions discussed above, in conjunction with the changes proposed to Part 5 of the Davis-Bacon rules (e.g. deletion of the requirement for submission of weekly payroll records) will result in substantial cost savings annually of $670 million for both contractors and the government while still assuring protection of local wage rates and practices. The changes will have a substantial beneficial impact on small contractors.

Copies of the complete analysis may be obtained from the Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. The Department requests comments and additional information on all economic assumptions used in the analysis as well as any alternative suggestions designed to achieve the objectives of Executive Order 12291 at lower costs.

Accordingly, it is proposed to revise Part 1 as set forth below:

Signed at Washington, D.C., on this 11th day of August, 1981.

Raymond J. Donovan,

Secretary of Labor.

Robert B. Collyer,

Deputy Under Secretary for Employment Standards.

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

Sec.

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259; 40 U.S.C. 276a—276a-7; 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

§ 1.1 Purpose and scope.

(a) The procedural rules in this part apply under the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 276a—276a-7) and other statutes listed in Appendix A to this part which provide for the payment of minimum wages, including fringe benefits to laborers and mechanics engaged in construction activity under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia, based on determinations by the Secretary of Labor of the wage rates and fringe benefits prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the local areas where such work is to be performed. Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (64 Stat. 1267, 5 U.S.C. Appendix), except those assigned to the Wage Appeals Board (see 29 CFR Part 7), have been delegated to the Assistant Secretary of Labor for Employment Standards who in turn has delegated the functions to the Administrator of the Wage and Hour Division, and authorized representatives.

(b) The regulations in this part set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits pursuant to the Davis-Bacon Act, each of the other statutes listed in Appendix A, any other Federal statute providing for determinations of such wages by the Secretary of Labor in accordance with the provisions of the Davis-Bacon Act.

(c) Procedures set forth in this part are applicable, unless otherwise indicated, both to general wage determinations published in the **Federal Register** for contracts in specified localities, and to project wage determinations for use on contract work to be performed on a specific project.

§ 1.2 Definitions.[1]

(a) (1) The "prevailing wage" shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the "prevailing wage" shall be the average of the wages paid, weighted by the total employed in the classification.

(2) In determining the "prevailing wages" at the time of issuance of a wage determination, the Administrator will be guided by paragraph (a)(1) of this section and will consider the types of information listed in § 1.3(b) of this part.

(b) The term "area" in determining wage rates under the Davis-Bacon Act and the prevailing wage provisions of the other statutes listed in Appendix A shall mean the city, town, village, county or other civil subdivision of the State in which the work is to be performed.

(c) The term "Administrator" shall mean the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division is designated to act for the Administrator under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator for the performance of functions relating to the making of wage determinations.

(d) The term "agency" shall mean the Federal agency, State highway department under 23 U.S.C. 113, or recipient State or local government under Title 1 of the State and Local Fiscal Assistance Act of 1972.

§ 1.3 Obtaining and compiling wage rate information.

For the purpose of making wage rate determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information.

(a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect not only the wage rates paid a particular classification in an area, but also the type or types of construction on which such rate or rates are paid.

(b) The following types of information will be considered in making wage rate determinations:

(1) Statements showing wage rates paid on projects. Such statements should indicate the names and addresses of contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, the number of workers employed in each classification on each project, and the respective wage rates paid such workers.

(2) Signed collective bargaining agreements. The Administrator may request the parties to an agreement to submit statements certifying to its scope and application.

[1] These definitions are not intended to restrict the meaning of the terms as used in the applicable statutes.

(3) Wage rates determined for public construction by State and local officials pursuant to prevailing wage legislation.

(4) In making wage rate determinations pursuant to 23 U.S.C. 113, the highway department of the State in which a project in the Federal-Aid highway system is to be performed shall be consulted. Before making a determination of wage rates for such a project the Administrator shall give due regard to the information thus obtained.

(5) Wage rate data submitted to the Department of Labor by contracting agencies pursuant to 29 CFR 5.5(a)(1)(ii).

(6) Any other information pertinent to the determination of prevailing wage rates.

(c) The Administrator may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from any sources determined to be necessary. All information of the types described in § 1.3(b) of this Part, pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in the light of § 1.2(a) of this Part.

§ 1.4 Outline of agency construction programs.

To the extent practicable, at the beginning of each fiscal year each agency using wage determinations under any of the various statutes listed in Appendix A will furnish the Administrator with a general outline of its proposed construction programs for the coming year indicating the estimated number of projects for which wage determinations will be required, the anticipated types of construction, and the locations of construction. During the fiscal year, each agency will notify the Administrator of any significant changes in its proposed construction programs, as outlined at the beginning of the fiscal year. This report has been cleared in accordance with FPMR 101–11.11 and assigned interagency report control number 1671–DOL–AN.

§ 1.5 Procedure for requesting wage determinations.

(a)(1) Except as provided in paragraph (b) of this section, the Federal agency shall initially request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting Standard Form 308 to the Department of Labor at this address:

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, D.C. 20210.

The agency shall check only those classifications on the applicable form which will be needed in the performance of the work. Inserting a note such as "entire schedule" or "all applicable classifications" is not sufficient. Additional classifications needed which are not on the form may be typed in the blank spaces or on a separate list and attached to the form. The agency shall not list classifications which can be fitted into classifications on the form, or classifications which are not generally recognized in the area or in the construction industry.

(2) In completing SF–308, the agency shall furnish:

(i) A sufficiently detailed description of the work to indicate the type of construction involved. Additional description or separate attachment, if necessary for identification of type of project, shall be furnished.

(ii) The county (or other civil subdivision) and State in which the proposed project is located.

(3) Such request for a wage determination shall be accompanied by any pertinent wage payment information which may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency shall also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

(b) Whenever the wage patterns in a particular area for a particular type of construction are well settled and whenever it may be reasonably anticipated that there will be a large volume of procurement in that area for such a type of construction, the Administrator, upon the request of a Federal agency or in his discretion, may publish a general wage determination in the **Federal Register** when, after consideration of the facts and circumstances involved, the Administrator finds that the applicable statutory standards and those of this part will be met. If there is a general wage determination applicable to the project, the agency may use it without notifying the Department of Labor, provided, that questions concerning its use are referred to the Department of Labor in accordance with § 1.6(b).

(c) The time required for processing requests for wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing in the Department of Labor will take at least 30 days.

§ 1.6 Use and effectiveness of wage determinations.

(a)(1) Project wage determinations initially issued shall be effective for 180 calendar days from the date of such determinations. If such a wage determination is not used in the period of its effectiveness it is void. Accordingly, if it appears that a wage determination may expire between bid opening and contract award (or between initial endorsement under the National Housing Act or the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937, and the start of construction) the agency shall request a new wage determination sufficiently in advance of the bid opening to assure receipt prior thereto. However, when due to unavoidable circumstances a determination expires before award but after bid opening (or before the start of construction, but after initial endorsement under the National Housing Act, or before the start of construction but after the execution of an agreement to enter into a housing assistance payments contract under Section 8 of the U.S. Housing Act of 1937), the head of the agency or his or her designee may request the Administrator to extend the expiration date of the wage determination in the bid specifications instead of issuing a new wage determination. Such request shall be supported by a written finding which shall include a brief statement of the factual support, that the extension of the expiration date of the determination is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all of the circumstances, including an examination to determine if the previously issued rates remain prevailing. If the request for extension is denied, the Administrator will proceed to issue a new wage determination for the project.

(2) General wage determinations issued pursuant to § 1.5(b) and which are published in the **Federal Register**, shall contain no expiration date.

(b) The criteria set forth in Appendix C should be used for guidance in how to apply wage determinations to projects. Any question regarding application of wage rate schedules or the guidelines contained in Appendix C shall be referred to the Administrator, who shall give foremost consideration to area practice in resolving the question.

(c)(1) Project and general wage determinations may be modified from time to time to keep them current. A modification may specify only the items being changed, or may be in the form of a supersedeas wage determination, which replaces the entire wage determination. Such actions are distinguished from a determination by the Administrator under paragraphs (d), (e) and (f) of this section that an erroneous wage determination has been issued or that the wrong wage determination or wage rate schedule has been utilized by the agency.

(2)(i) All actions modifying a project wage determination received by the agency before contract award (or the start of construction where there is no contract award) shall be effective except as follows:

(A) In the case of contracts entered into pursuant to competitive bidding procedures, modifications received by the agency less than 10 days before the opening of bids shall be effective unless the agency finds that there is not a reasonable time still available before bid opening, to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator upon request. No such report shall be required if the modification is received after bid opening.

(B) In the case of those contracts entered into under the National Housing Act which are not awarded pursuant to competitive bidding procedures, modifications shall be effective if received prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(C) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, if there is no contract for the project awarded pursuant to competitive bidding procedures, modifications shall be effective if received prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is executed, whichever occurs first.

(ii) Modifications to project wage determinations and supersedeas wage determinations shall not be effective after contract award, or after the beginning of construction, as appropriate.

(iii) Actual written notice of a modification shall constitute receipt.

(3) All actions modifying a general wage determination shall be effective with respect to any project to which the determination applies, if published before contract award (or the start of construction where there is no contract award), except as follows:

(i) In the case of contracts entered into pursuant to competitive bidding procedures, modifications published less than 10 days before the opening of bids shall be effective unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator upon request. No such report shall be required if the modification is published after bid opening.

(ii) In the case of those contracts entered into under the National Housing Act which are not awarded pursuant to competitive bidding procedures, modifications shall be effective if published prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(iii) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, if there is no contract for the project awarded pursuant to competitive bidding procedures, modifications shall be effective if published prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever occurs first.

(iv) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, or if under paragraph (c)(3) (ii) or (iii) of this section construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any modifications published in the **Federal Register** prior to award of the contract or the beginning of construction, as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator. Such request shall be supported by a written finding, which shall include a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(v) A modification to a general wage determination is "published" within the meaning of this section on the date of publication in the **Federal Register**, or on the date the agency receives actual written notice of the modification from the Department of Labor, whichever occurs first.

(vi) Modifications or supersedeas wage determinations to an applicable general wage determination published after contract award or after the beginning of construction, as appropriate, shall not be effective.

(d) Upon his/her own initiative or at the request of an agency, the Administrator may correct any wage determination, without regard to paragraph (c) of this section, whenever the Administrator finds such a wage determination contains clerical errors. Such corrections shall be included in any bid specifications containing the wage determination, or in any on-going contract containing the wage determination in question, retroactively to the start of construction.

(e) Written notification by the Department of Labor prior to the award of a contract (or the start of construction under the National Housing Act, under Section 8 of the U.S. Housing Act of 1937, or where there is no contract award) that (1) there is included in the bidding documents or solicitation the wrong wage determination or the wrong schedule or that (2) a wage determination is withdrawn because the Department of Labor has determined that it contains substantial errors (as distinguished from rates which are no longer current), shall be effective immediately without regard to paragraph (c) of this section.

(f) The Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may issue a wage determination which shall be applicable to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination. Under any of the above circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, *provided* that the

contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

(g) If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award or the beginning of construction, as appropriate, the agency shall request a wage determination prior to approval of such funds. Such a wage determination shall be issued based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under Section 8 of the U.S. Housing Act of 1937 or where there is no contract award), as appropriate, and shall be incorporated in the contract specifications retroactively to that date, *provided*, that upon the request of the head of the agency in individual cases the Administrator may issue such a wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *provided further* that the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.

§ 1.7 Scope of consideration.

(a) In making a wage determination, the "area" will normally be the county unless sufficient current wage data (data on wages paid no more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.

(b) If there has not been sufficient similar construction within the area in the past year to make a wage determination. Wages paid on similar construction in surrounding counties may be considered, *provided* that projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county, and projects in rural counties may not be used as a source of data for a wage determination for a metropolitan county.

(c) If there has not been sufficient similar construction in surrounding counties or in the State in the past year, wages paid on projects completed more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.

(d) Classifications and wage rates will be issued for identifiable "classes of laborers and mechanics." A semi-skilled classification of laborers or helpers, or other subclassification of a journeyman classification, is issued when the classification is identifiable in the area. The use of helpers, apprentices and trainees is permitted in accordance with Part 5 of this subtitle.

§ 1.8 Reconsideration by the Administrator.

Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination. Such a request for reconsideration shall be in writing accompanied by a full statement of the interested person's views and any supporting wage data or other pertinent information. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30 day period that additional time is necessary.

§ 1.9 Review by Wage Appeals Board.

Any interested person may appeal to the Wage Appeals Board for a review of a wage determination or its application made under this part, after reconsideration by the Administrator has been sought pursuant to § 1.8 and denied. Any such appeal may, in the discretion of the Wage Appeals Board, be received, accepted, and decided in accordance with the provisions of 29 CFR Part 7 and such other procedures as the Board may establish.

Appendix A

Statutes Related to the Davis-Bacon Act Requiring Payment of Wages at Rates Predetermined by the Secretary of Labor

1. The Davis-Bacon Act (secs. 1–7, 46 Stat. 1494, as amended; Pub. L. 74–403, 40 U.S.C. 276a–276a–7).

2. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).

3. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

4. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86–372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).

5. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

6. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).

7. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 684(b)(5)).

8. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).

9. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91–230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92–318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.

10. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113 as amended), see particularly the amendments in the Federal-Aid Highway Act of 1963 (Pub. L. 90–495, 62 Stat. 815).

11. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).

12. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

13. Rehabilitation Act of 1973 (sec. 306(b)(5), 87 Stat. 384, 29 U.S.C. 776(b)(5)).

14. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 83 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

15. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).

16. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).

17. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).

18. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).

19. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).

20. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).

21. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 306(h)(2) thereof, 83 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).

22. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).

23. Health Professions Education Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2256, 42 U.S.C. 293a(c)(7)).

24. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 364; 42 U.S.C. 296a(b)(5)).

25. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).

26. Safe Drinking Water Act (sec. 2(a), see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j–9(e)).

27. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o–3(b)(1)(H)).

28. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).

29. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

30. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

31. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

32. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c–3).

33. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

34. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).

35. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).

36. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).

37. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).

38. Older Americans Act of 1965 (sec. 502, Pub. L. 89–73, as amended by sec. 501, Pub. L. 93–29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).

39. Public Works and Economic Development Act of 1965 (sec. 712, 79 Stat. 575 as amended; 42 U.S.C. 3222).

40. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).

41. New Communities Act of 1968 (sec. 410.82 Stat. 516; 42 U.S.C. 3909).

42. Urban Growth and New Community Development Act of 1970. (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

43. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

44. Housing and Community Development Act of 1974 (secs. 110, 802(g), 83 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).

45. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).

46. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).

47. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

48. Energy Conservation and Production Act (sec. 45(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

49. Solid Waste Disposal Act (sec. 2, 90 Stat. 2828; 42 U.S.C. 6979).

50. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).

51. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).

52. Highway speed ground transportation study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

53. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

54. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281(i)).

55. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat; 40 U.S.C. 682(b)(4)).

Note.—Repealed Dec. 9, 1969 and labor standards incorporated in sec. 1–1431 of the District of Columbia Code).

56. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89–694, but not in the United States Code.

57. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87–328) (considered a statute for purposes of this part but not in the United States Code).

58. Energy Security Act (Sec. 175(c), Pub. L. 96–294, 94 Stat. 611; 42 U.S.C. 6701 note).

Appendix B

Boston Region

For the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, JFK Federal Building, Government Center, Room 1612C, Boston, Massachusetts 02203 (telephone: 617–223–5565).

New York Region

For the States of New Jersey and New York and for the Canal Zone, Puerto Rico, and the Virgin Islands:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 1515 Broadway, Room 3300, New York, New York 10036 (telephone: 212–399–5443).

Philadelphia Region

For the States of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia, and the District of Columbia:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Gateway Building, Room 15220, 3535 Market Street, Philadelphia, Pennsylvania 19104 (telephone 215–596–1193).

Atlanta Region

For the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 1371 Peachtree Street, N.E., Room 305, Atlanta, Georgia 30309 (telephone: 404–881–4801).

Chicago Region

For the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, Illinois 60604 (telephone: 312–353–7249).

Dallas Region

For the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 555 Griffin Square Building, Young and Griffin Streets, Dallas, Texas 75202 (telephone: 214–767–6891).

Kansas City Region

For the States of Iowa, Kansas, Missouri, and Nebraska:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 2000, 911 Walnut Street, Kansas City, Missouri 64106 (telephone: 816–374–5386).

Denver Region

For the States of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 1440, 1961 Stout Street, Denver, Colorado 80294 (telephone: 304–837–4613).

San Francisco Region

For the States of Arizona, California, Hawaii, and Nevada:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 450 Golden Gate Avenue, Room 10353, San Francisco, California 94102 (telephone: 415–556–3592).

Seattle Region

For the States of Alaska, Idaho, Oregon, and Washington:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 4141, 909 First Avenue, Seattle, Washington 98174 (telephone: 206–442–1916).

Appendix C

Subject: Application Of The Standard Of Comparison "Projects Of A Character Similar" Under The Davis-Bacon And Related Acts

The purpose of this memorandum is to set forth policies of the Wage and Hour Division with regard to the determination of "projects of a character similar to the contract work" for wage determination purposes. The guidelines contained in the memorandum are illustrative in nature. They should be used by the contracting agencies in selecting the proper schedule(s) of wage rates from the **Federal Register** and in instructing contractors regarding the application of multiple schedules, unless the Wage and Hour Division advises otherwise. This memorandum supersedes All Agency Memorandum No. 68 (July 19, 1966), No. 130 (March 17, 1978), and No. 131 (July 14, 1978).

The Davis-Bacon and related Acts require the Secretary of Labor to determine the prevailing wage rates for corresponding classes of laborers and mechanics on projects in the area which are of a "character similar" to the proposed contract work to which the determination will be applied. The Department's Wage Appeals Board in a decision specifically relating to high-rise apartment buildings (WAB Case No. 76–11, dated January 27, 1977) stated:

"The test of whether a project is of a character similar to another project refers to the nature of the project itself in a construction sense, not to whether union or nonunion wages are paid or whether union or nonunion workers are employed. Since the 1935 amendments to the Davis-Bacon Act, the statutory focus has always been on the

character of the project itself rather than on who was employed on the project or how much he or she was being paid."

Again, in a decision relating to a water treatment plant project (WAB Case No. 77–20, dated September 30, 1977), the Board stated: "When it is clear from the nature of the project itself in a construction sense that it is to be categorized as either building, heavy, or highway construction it is not necessary to resort to an area practice survey to determine the appropriate categorization of the project."

Where the proper category of construction is not clear, however, the Board has advised that the wages being paid may be considered to determine the appropriate category of construction, together with other characteristics, such as construction techniques, material and equipment used, and skills called for. WAB Case No. 77–23, dated December 30, 1977.

Generally, construction projects are classified as either Building, Heavy, Highway or Residential.[1] However, separate wage rate schedules are applied where a project includes structures in more than one category and the amount of construction in each category is substantial, either in relation to the overall project (approximately 20 percent or more of total project cost) or in dollar amount (approximately $250,000 or more). Separate schedules are common, for example, for water and sewage treatment plants, which generally include both buildings and non-building structures. On the other hand, water and sewer lines and paving on building projects are generally only incidental to a project, and therefore separate schedules are not ordinarily issued.[2]

Below are descriptions of the four major categories of construction, together with an illustrative list of the kinds of projects which are generally included within each category:

Building Construction

Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade level, as well as incidental grading, utilities and paving. Additionally, such structures need not be "habitable" to be building construction. The installation of heavy machinery and/or equipment does not generally change the project's character as a building.

Examples

Alterations and additions to buildings
Apartment buildings (5 stories and above)
Arenas (enclosed)
Auditoriums
Automobile parking garages
Banks and financial buildings
Barracks
Churches
City halls
Civic centers
Commercial buildings
Court houses
Detention facilities
Dormitories
Farm buildings
Fire stations
Hospitals
Hotels
Industrial buildings
Institutional buildings
Libraries
Mausoleums
Motels
Museums
Nursing and convalescent facilities
Office buildings
Out-patient clinics
Passenger and freight terminal buildings
Police stations
Post offices
Power plants
Prefabricated buildings
Remodeling buildings
Renovating buildings
Repairing buildings
Restaurants
Schools
Service stations
Shopping centers
Stores
Subway stations
Theaters
Warehouses
Water and sewage treatment plants (buildings only)

Residential Construction

Residential projects for Davis-Bacon purposes are those involving the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks.

Examples

Town or row houses
Apartment buildings (4 stories or less)
Single family houses
Mobile home developments
Multi-family houses
Married student housing

Heavy Construction

Heavy projects are those projects that are not properly classified as either "building", "highway", or "residential". Unlike these classifications, heavy construction is not a homogeneous classification. Because of this catch-all nature, projects within the heavy classification may sometimes be distinguished on the basis of their particular project characteristics, and separate schedules issued. For example, separate schedules may be issued for dredging projects, water and sewer line projects, dams, major bridges, and flood control projects.

Examples

Antenna towers
Bridges (bascule, suspension and spandrel arch bridges; bridges designed for commercial navigation; bridges involving marine construction; and other major bridges)
Breakwaters
Caissons (other than building or highway)
Canals
Channels
Channel cut-offs
Chemical complexes or facilities (other than buildings)
Cofferdams
Coke ovens
Dams
Dikes
Docks
Drainage projects
Dredging projects
Electrification projects (outdoor)
Flood control projects
Industrial incinerators (other than building)
Irrigation projects
Jetties
Kilns
Land drainage (not incidental to other construction)
Land leveling (not incidental to other construction)
Land reclamation
Levees
Locks, waterways
Oil refineries (other than buildings)
Pipe lines
Ponds
Pumping stations (prefabricated drop-in units)
Railroad construction
Reservoirs
Revetments
Sewage collection and disposal lines
Sewers (sanitary, storm, etc.)
Shoreline maintenance
Ski tows
Storage tanks
Swimming pools (outdoor)
Subways (other than stations and buildings)
Tipples
Tunnels
Unsheltered piers and wharves
Viaducts (other than highway)
Water mains
Waterway construction
Water supply lines (not incidental to building)
Water and sewage treatment plants (other than buildings)
Wells

Highway Construction

Highway projects include the construction, alteration or repair of roads, streets,

[1] For wage determination purposes, a project generally consists of all construction necessary to complete a facility regardless of the number of contracts involved, so long as all contracts awarded are closely related in purpose, time and place. For example, demolition or site work preparatory to building construction is considered a part of the building project for wage determination purposes. In contrast, because of the extensive size of a rapid rail system or a highway, which is built over a period of years, each segment is considered a separate project. See *MARTA*, WAB Case No. 75–5, dated October 16, 1975. Similarly, a rest area on a highway is considered a separate project.

[2] In certain areas of the country different wage rates are paid for incidental paving and utilities than for the remainder of a building project. Accordingly, in such areas the Wage and Hour Division issues the rates which are paid on such work on building projects. See WAB Case No. 77–19, dated December 30, 1977.

highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

Examples

Alleys
Base courses
Bituminous treatments
Bridle paths
Concrete pavement
Curbs
Excavation and embankment (for road construction)
Fencing (highway)
Grade crossing elimination (overpasses or underpasses)
Guard rails on highway
Highway signs
Highway bridges (overpasses; underpasses; grade separation)
Medians
Parking lots
Parkways
Resurfacing streets and highways
Roadbeds
Roadways
Runways
Shoulders
Stabilizing courses
Storm sewers incidental to road construction
Street Paving
Surface courses
Taxiways
Trails

Unless the Wage and Hour Division advises otherwise, as set forth below, the descriptions and classifications above are to be utilized by contracting agencies in selecting the appropriate wage schedule from the **Federal Register** and in determining the application of multiple schedules issued by the Wage and Hour Division. The advertised and contract specifications should identify as specifically as possible the structures to which the schedule applies and only the appropriate schedule(s) from the **Federal Register** should be incorporated into the specifications. Where multiple schedules are issued for a project by the Wage and Hour Division, they are to be utilized in the specifications and any applicable instructions regarding their use are to be observed.

To ensure that appropriate schedules are issued by the Wage and Hour Division, contracting agencies are reminded of their responsibility to provide a sufficiently detailed description of the project to enable the Wage and Hour Division to determine the character of the project. If structures in more than one category of construction are involved, such structures should be identified, together with an estimate of the cost of those structures in dollar amounts and in relation to total project cost.

Furthermore, contracting agencies have the authority only in the first instance to designate the appropriate wage schedule(s) from the **Federal Register** and, in the absence of instructions from the Wage and Hour Division, to determine the application of multiple schedules issued by the Wage and Hour Division in project wage determinations. It is recognized that in individual cases or with respect to specific areas of the country, application of these guidelines may not be appropriate, such as where the category of construction is not clear and a definitive area practice has developed. For example, major bridges are ordinarily heavy construction, but have attributes of both heavy and highway construction; accordingly, area practice will determine whether heavy rates, highway rates, or a combination thereof, are applicable to a project. Similarly, pumping stations vary greatly in sophistication and construction techniques, requiring close examination.

In any instance where a contracting agency has a question regarding application of the guidelines to a specific case, or where a question is raised by interested parties concerning the appropriate schedule(s) to be applied to a contract, the question is to be referred to the Wage and Hour Division. This referral should include a complete description of the project, any evidence available regarding area practice of wages paid on similar projects, comments by interested parties which may have been submitted to the agency, and the agency's own view.

Agencies are advised that the U.S. Court of Appeals for the Fifth Circuit has ruled that where a party has objected to a Federal agency's application of a general wage determination to a project, the question must be submitted to the Department of Labor pursuant to the regulations, 29 CFR 5.13, and bid opening cannot proceed until the dispute is resolved by the Secretary. *North Georgia Building and Construction Trades, supra.* The Wage and Hour Division will endeavor to cooprate with the contracting agencies in acting expeditiously with a view towards procurement deadlines.

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federal register

Friday
August 14, 1981

Part VIII

Department of Labor

Wage and Hour Division, Employment Standards Administration

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 5

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document is a proposal to revise Regulations on labor standards covering federally financed and assisted construction and contracts subject to the Contract Work Hours and Safety Standards Act, Part 5, Subpart A. These regulations are issued pursuant to the Secretary's authority under Reorganization Plan No. 14 of 1950 and 40 U.S.C. 276c. Changes are proposed in the contract labor standards clauses which are required to be included in such construction contracts to eliminate the requirement that contractors and subcontractors submit weekly payrolls to the appropriate Federal agencies and to provide for the increased use of helpers whenever they are utilized in the area.

DATES: Comments (three copies) must be received on or before October 13, 1981.

ADDRESS: Comments should be sent to William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, D.C. 20210

FOR FURTHER INFORMATION CONTACT: William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, D.C. 20210, Telephone: 202–523–8305.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a proposal was published in the **Federal Register** (44 FR 77080) to make certain revisions to Subpart A of Regulations, 29 CFR Part 5, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act). The purpose of these changes was to revise, update, and clarify this subpart.

Interested persons were afforded the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the notice in the **Federal Register**. Subsequently, on February 15 and April 1, 1980, notice was given in the **Federal Register** extending the dates for submission of comments to March 27 and May 27, 1980, respectively. On January 16, 1981, this regulation was published in the **Federal Register** (46 FR 4380) as a final rule with a scheduled effective date of February 17, 1981. However, pursuant to the President's Memorandum of January 29, 1981, the Department published a notice in the **Federal Register** on February 6, 1981 (46 FR 11253), delaying implementation of this regulation until March 30, 1981. The Department subsequently delayed the implementation of this regulation until August 15, 1981 in order to permit reconsideration pursuant to Executive Order 12291. See 46 FR 18973 (March 27, 1981); 46 FR 23739 (April 28, 1981); 46 FR 33514 (June 30, 1981); and 46 FR 36140 (July 14,1981).

During this period, the Department conducted a thorough review of this regulation and has made appropriate proposed changes to the published rule as contained in this document. Accordingly, this regulation is being postponed by separate document until action is taken on this proposal. It has been concluded, in accordance with Executive Order 12291, that the proposed changes are the most cost effective alternative consistent with the purpose of the statute.

The regulations proposed today would not appear to require a regulatory impact analysis under the Executive Order since these changes will result in substantial cost savings annually for both contractors and the government while still assuring protection of local wage rates and practices, and effective enforcement of the Act. Because of the importance to the government and the public of the issues involved, the Department has, nevertheless, concluded that the regulation should be deemed a "major" rule for purposes of Executive Order 12291. The Department's initial regulatory impact analyis and the initial regulatory flexibility analysis assessing the impact of the proposed changes on small entities, as required by the Regulatory Flexibility Act, are summarized after the discussion below of the proposed changes.

Section 5.2(1), defining "site of the work", would be revised for clarification.

Section 5.2(n)(4) would be revised to provide a general definition of semi-skilled "helper", and § 5.5(a)(4)(iv) would be revised to add a provision setting forth the conditions under which helpers wil be permitted to work on Federal or Federally assisted projects. A revision in § 5.5(a)(1)(ii) would permit a helper classification to be established through the conformance process where the classification is utilized in the area, but is not listed on the wage determination.

These revisions have been proposed to reflect the industry practice of employing semi-skilled workers on construction projects. However, to protect against possible abuse, the regulation would prohibit use of journeymen as helpers and restrict the ratio of helpers to journeymen to one similar to that permitted under apprenticeship programs.

Section 5.5(a)(2) would be revised to make it clear that where the subcontractor has violated the Act, withholding from other contracts can only be taken from other contracts with the same prime contractor, rather than other contracts with the same subcontractor.

Section 5.5(a)(3)(ii) would be revised to eliminate the requirement that the contractor submit weekly a copy of all payrolls to the appropriate Federal agency, but would retain the requirement in accordance with the Copeland Act that the contractor submit weekly a certified "Statement of Compliance". After detailed review of the Copeland Act (40 U.S.C. 276c, as amended) and reconsideration of the regulation in accordance with the Paperwork Reduction Act, the Department has determined that the statutory requirement to furnish weekly a statement with respect to the wages paid each employee during the preceding week can be satisfied by a weekly submission of a statement certifying compliance. This change is in keeping with the Administration's objective of reducing reporting burdens imposed on the public, and is in recognition of the fact that the payrolls are often not examined by certain Federal agencies. However, the proposed regulation also would require that the payrolls be submitted upon request to permit agencies without on-site investigative staff to require submission on a periodic basis, or during investigations if payrolls are not available in the locality where the work is performed. To ensure the continued effectiveness of the Copeland Anti-Kickback Act, the proposed regulation makes it clear that failure to comply with this provision may be a basis for debarment.

Because of the importance the Department places on occupational training and the impact of such training

on job opportunities for youth, women, and minorities, the responsibility for approval of trainee programs under the Act is being placed at the highest level of the Department's appropriate changes and deletions are made in §§ 5.2(n)(2), 5.5(a)(4)(ii), 5.16, 5.17, and 5.18.

Summary of Preliminary Regulatory Impact and Regulatory Flexibility Analysis

The Department has prepared its preliminary regulatory impact analysis to identify and quantify the cost impact of the proposed changes and various alternatives that were explored and to inform the public of the economic considerations behind these proposed revisions in accordance with Executive Order 12291.

The new proposal must also consider the Regulatory Flexibility Act of 1980. This Act requires agencies to prepare regulatory flexibility analyses and to develop flexible alternatives whenever possible in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The following analysis meets the requirements set forth for assessing the economic impact of the proposed changes in the Davis-Bacon regulations on small entities as required under the regulatory Flexibility Act.

A. *Cost Savings from Eliminating Weekly Payroll Submissions.* Current DOL regulations in 29 C.F.R. Part 5 require contractors to submit a statement of compliance together with a copy of the weekly payroll to assure compliance with the Copeland Act. Contractors have raised numerous concerns that the requirements for weekly submissions of payroll records imposed substantial administrative burdens on contractors, while contributing little to enforcement of the Davis-Bacon Act.

The January 16 regulation made it clear that contractors were allowed to submit payroll records in any form, thereby eliminating the costs of transcribing payroll data onto the optional government forms. The proposed regulations goes even further—eliminating payroll submissions entirely, requiring only a weekly certified "Statement of Compliance". The proposed regulation thus conforms with the recommendations of two study groups of the Commission on Government Procurement.* The Department also considered eliminating all weekly submissions, but concluded that the Copeland act requires that contractors submit each week a statement on the wages paid to each employee during the preceding week.

While we have made no independent estimate of the administrative costs associated with this provision due to data limitations, several estimates of the costs of compliance with Davis-Bacon and Copeland Act reporting requirements are available.

A previous DOL estimate uses a 5.5 million estimate of the annual burden hours for compliance with the Paperwork Reduction Act. Assuming a $5.00 hourly wage rate for a bookkeeper for these burden hours, this procedure produces a $27.5 million estimate of the costs of Davis-Bacon reporting requirements.

A second estimate comes from a 1972 survey by the Associated General Contractors of America (AGC) of its membership to estimate the administrative costs of the payroll reporting requirements of the Davis-Bacon Act. Thirty-four respondents reported estimates of administrative costs per million dollars of contract price. On the basis of this information, AGC estimated that .5 percent of the overall cost of Davis-Bacon contracts was accounted for by the payroll reporting and recordkeeping requirements. Applying this estimate to the FY 1982 estimated value of Federal constuction of $30.3 billion yields an annual cost saving of nearly $152 million.

This study provides an upperbound estimate of the resulting cost savings since it includes other recordkeeping items such as the maintenance and storage of detailed payrolls on each employee for specified time periods and the prominent posting of wages paid each worker at their work site. However, the costs of weekly payroll submissions were certainly a large component of these administrative costs. Moreover, on the basis of GAO's estimate of about 600,000 prime and subcontracts annually, this estimate translates into about $250 per contract, a not unreasonable estimate of the costs of compliance with this provision. GAO's estimate which is based on this survey adjusts the AGC figure downward to $100 million to reflect the likely survey biases. This appears to be an appropriate estimate of the likely reduction in administrative costs from eliminating the weekly payroll submissions.

Much of these cost savings would be passed on to the 53,665 smaller contractors with fewer than 20 employees involved in construction work. These small contractors account for 56 percent of government contractors, but only about 15 percent of government-owned construction receipts. Since the AGC survey indicated that administrative costs were relatively higher for these small contractors, we used both percentages to estimate the impact of eliminating weekly payroll submissions on smaller contractors. The resulting estimated cost savings to these small contractors range from $15 million to $56 million annually.

B. *Cost Impact of the Expanded Issuance of Semi-Skilled Classifications.* The Department has long permitted exceptions from predetermined Davis-Bacon rates set for a craft classification for apprentices and trainees who are in approved programs. The Department has also recognized a helper classification in some areas under certain well-defined situations where (1) it constitutes a separate and distinct class of workers (i.e., the scope of duties of the helper is defined and can be differentiated from journeyman duties); (2) the particular helper classification prevails in the area; and (3) the helper is not used as an informal apprentice or trainee.

During its review, the Department concluded that the current regulations regarding semi-skilled crafts do not adequately reflect local practices in the construction industry, in particular, the widespread use of helpers to perform certain craft tasks. For example, the 1976–1977 BLS survey of large metropolitan areas found that among non-union construction firms, the ratio of helpers to journeymen ranged from .35 for carpenters to .86 for bricklayers. The wage differences were also large—the average wage of helpers ranged from 58 percent (bricklayers) to 68 percent (carpenters) of that of journeymen.

The proposed regulation would expand the use of nonjourneymen in Davis-Bacon construction by issuing helper classifications on all wage determinations when they can be identified in the locality and by permitting conformance of helpers. Helpers would be broadly defined in the regulation, and permitted in a ratio of one helper to five journeymen. These changes should result in substantial cost savings by allowing contractors increased flexibility in their work assignments to use less-costly semi-skilled workers instead of journeymen.

The precise impact of the proposed changes on construction costs cannot be estimated with available data. Most importantly, while information exists on the relative wages of journeymen and helpers, there is no corresponding data on their relative productivities with which to measure the change in labor costs. As a result, we must again use

*See GAO, *The Davis-Bacon Act Should be Repealed*, April 1979, pp. 78–82.

wage differences to proxy these construction costs differences.

The Department used a different approach to estimate the wage impact of eliminating current restrictions on the issuance of helper rates. In order to calculate the potential wage savings, we tried to predict how the proposed revisions would alter the relative demand for helpers (in place of journeymen). The estimated additional number of helpers expected on Davis-Bacon projects was multiplied by an estimate of the difference in wages paid helpers and journeymen and average hours worked annually (1535 hours) in the construction industry to derive an estimate of the aggregate wage savings.

To derive an estimate of the mix of helpers and journeymen we assumed that once the current restrictions are lifted, the ration of helpers to journeymen on Davis-Bacon construction projects would be identical to that found overall in construction (excluding single-family residential construction). Several estimates of this ratio are available from various published sources. We used a ratio derived from BLS survey data of large metropolitan areas indicating that one helper is hired for every seventeen journeymen. However, since this particular sample is heavily unionized (in the union sector, relatively fewer helpers are utilized), we also used a 1:10 ration as an alternative estimate.

These ratios help us calculate the additional helpers expected. Applying these ratios to the universe of current journeymen on Davis-Bacon projects (estimated at 651,000) would indicate about 38,409 (or alternatively 65,100) additional helpers on such construction, under the proposed changes. Our estimates of the resulting cost savings from increased recognition of helpers were obtained by multiplying the number of additional helpers by the average hours worked in a year (1535) and various estimates of the wage differential between helpers and journeymen from available sources. The estimated cost savings assuming a 1:17 ratio range from about $203 million to nearly $410 million. With the lower 1:10 ratio, the corresponding estimates range as high as $695 million. The average estimate based on these ranges is about $450 million.

C. *Summary.* The proposed revisions discussed above, in conjunction with the changes proposed to Part 1 of the Davis-Bacon rules (e.g. a change in the definition of "prevailing rate") will result in substantial cost savings annually of $670 million for both contractors and the government while still assuring protection of local wage rates and practices. The changes will have a substantial beneficial impact on small contractors.

Copies of the complete analysis may be obtained form the Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. The Department requests comments and additional information on all economic assumptions used in the analysis as well as any alternative suggestions designed to achieve the objectives of Executive Order 12291 at lower costs.

Accordingly, it is proposed to revise Subpart A of Part 5 as set forth below:

Signed at Washington, D.C. on this 11th day of August, 1981.

Raymond J. Donovan,

Secretary of Labor.

Robert B. Collyer,

Deputy Under Secretary for Employment Standards.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

Sec.

* * * * *

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1950 and the Copeland Act in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and of such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon the Secretary of Labor under Reorganization Plan No. 14 of 1950:

1. The Davis-Bacon Act (sec. 1–7, 46 Stat. 1949, as amended; Pub. L. 74–403, 40 U.S.C 276a–276a–7).

2. Copeland Act (40 U.S.C. 276c).

3. The Contract Work Hours and Safety Standards Act (40 U.S.C. 327–332).

4. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).

5. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

6. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86–372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).

7. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

8. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).

9. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 684(b)(5)).

10. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).

11. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91–230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92–318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.

12. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113, as amended), see particularly the amendments in the Federal-Aid Highway Act of 1968 (Pub. L. 90–495, 62 Stat. 815).

13. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).

14. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

15. Rehabilitation Act of 1973 (sec. 306(b)(5) 87 Stat. 384, 29 U.S.C. 776(b)(5)).

16. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

17. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).
18. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).
19. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).
20. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).
21. National Visitors Center Facilities Act of 1966 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).
22. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).
23. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).
24. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).
25. Health Professions Educational Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2258, 42 U.S.C. 293a(c)(7)).
26. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 384; 42 U.S.C. 296a(b)(5)).
27. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).
28. Safe Drinking Water Act (sec. 2(a) see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j–9(e)).
29. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o–3(b)(1)(H)).
30. U.S. Housing Act of 1937, as amended and recodified (68 Stat. 667; 42 U.S.C. 1437j).
31. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).
32. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).
33. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).
34. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c–3).
35. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).
36. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).
37. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).
38. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).
39. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).
40. Older Americans Act of 1965 (sec. 502, Pub. L. 89–73, as amended by sec. 501, Pub. L. 93–29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).
41. Public Works and Economic Development Act of 1965 (sec. 712; 79 Stat. 575 as amended; 42 U.S.C. 3222).
42. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).
43. New Communities Act of 1968 (sec. 410, 82 Stat. 516; 42 U.S.C. 3909).
44. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).
45. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).
46. Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).
47. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).
48. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).
49. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).
50. Energy Conservation and Production Act (sec. 451(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).
51. Solid Waste Disposal Act (sec. 2, 90 Stat. 2823; 42 U.S.C. 6979).
52. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).
53. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).
54. Highway Speed Ground Transportation Study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).
55. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).
56. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281i).
57. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4). **Note.**—Repealed December 9, 1969, and labor standards incorporated in sec. 1–1431 of the District of Columbia Code).
58. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89–694, but not in the United States Code).
59. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87–328) (considered a statute for purposes of the plan but not in the United States Code).
60. Energy Security Act (sec. 175(c), Pub. L. 96–294, 94 Stat. 611; 42 U.S.C. 8701 note).

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determinations and the issuance and use of such wage determinations under the Davis-Bacon Act and its related statutes as listed in that part.

§ 5.2 Definitions.

(a) The term "Secretary" includes the Secretary of Labor, the Deputy Under Secretary for Employment Standards, and their authorized representatives.

(b) The term "Administrator" means the Administrator of the Wage and Hour Division or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division, is designated to act for the Administrator under this Part. Except as otherwise provided in this Part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator in the administration of the statutes listed in § 5.1.

(c) The term "Federal agency" means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to a statute listed in § 5.1.

(d) The term "Agency Head" means the principal official of the Federal agency and includes those persons duly authorized to act in the behalf of the Agency Head.

(e) The term "Contracting Officer" means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

(f) The term "labor standards" as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes listed in § 5.1, and the regulations in Parts 1 and 3 of this subtitle and this part.

(g) The term "United States or the District of Columbia" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities.

(h) The term "contract" means any contract in excess of $2,000 which is subject wholly or in part to the labor standards provisions of any of the acts listed in § 5.1 and any subcontract of any tier thereunder, let under the prime contract, which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution, except where a different meaning is expressly indicated. A State or local Government is not regarded as a

contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under certain enabling statutes, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.

(i) The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(j) The terms "construction", "prosecution", "completion", or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on-site of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project), by persons employed by the contractor or subcontractor. However, the term "initial construction" in section 113 of Title 23, U.S.C., which pertains to Federal-aid highway work, does not include repair or maintenance work.

(k) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(l) The term "site of the work" is defined as follows:

(1) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site" because of its proximity.

(2) Fabrication Plants, "mobile factories," batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of the work" provided they are dedicated exclusively, or nearly so, to performance of the contract or project and are so located in proximity to the actual construction location that it would be reasonable to include them.

(3) Not included in the "site of the work" are permanent home offices or branch plant establishments of a contractor or subcontractor, its fabrication plant and tool yard establishments, whose locations and continuance are governed by its general business operations. Such previously established facilities are not a part of the "site of the work", even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(m) The term "laborer" or "mechanic" includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term "laborer" or "mechanic" includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of Part 541, are laborers and mechanics for the time so spent.

(n) The terms apprentice, trainee, and helper are defined as follows:

(1) "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration.

(3) These provisions do not apply to "apprentices" and "trainees" employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying, and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

(o) Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or

guarantees from the United States is "employed" regardless of any contractual relationship alleged to exist between the contractor or such person.

(p) The term "wages" means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

(q) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of § 1.6 of this title.

§§ 5.3–5.4 [Reserved]

§ 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract subject to the labor standards provisions of any of the acts listed in § 5.1, except those subject only to the Contract Work Hours and Safety Standards Act, the following clauses (or any modifications thereof to meet the particular needs of the agency: *Provided,* That such modifications are first approved by the Department of Labor):

(1) *Minimum wages.* (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to the skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided,* That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(*1*) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is utilized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, agree with the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator, or an authorized representative, will respond within 30 days of receipt thereof and will approve, reverse, or modify every additional classification action.

(C) In the event the contractor, or the laborers or mechanics to be employed in the classification or their representatives, do not agree with the contracting officer on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt unless notice is otherwise furnished to the contracting agency within the 30 day period.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (1)(B) or (C) of this paragraph, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing

bona fide fringe benefits under a plan or program. *Provided,* That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding.* The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices and trainees, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice or trainee, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a "Statement of Compliance" to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the "Statement of Compliance" to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The prime contractor is responsible for the submission of the "Statement of Compliance" by all subcontractors.

(B) Each "Statement of Compliance" shall be signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(*1*) That the payroll for the payroll period contains the information required to be maintained under § 5.5(a)(3)(i) of Regulations, 29 CFR Part 5 and that such information is correct and complete;

(*2*) That all laborerers or mechanics (including helpers, apprentices, and trainees) employed on the contract during the payroll period have been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR Part 3;

(*3*) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents on the wage determination incorporated into the contract for the classification of work performed.

(C) The willful falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.

(iii) The contractor or subcontractor, upon request of the authorized representatives of the (write the name of the agency) or the Department of Labor, shall submit the records required under paragraph (a)(3)(i) of this section, shall make them available for inspection, copying, or transcription by such representatives and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) *Apprentices, trainees, and helpers*—(i) *Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide appreticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the

work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work perfomed until an acceptable program is approved.

(ii) *Trainees.* Except as provided in 29 CFR 5.16 trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity.* The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(iv) *Helpers.* Helpers will be permitted to work on a project if the helper classification is specified on an applicable wage determination or is approved pursuant to the conformance procedure set forth in § 5.5 (a)(1)(ii). Unless otherwise specified on an applicable wage determination, the allowable ratio of helpers to journeymen on the job site in any classification shall not be greater than one helper to five journeymen. Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2(n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio permitted shall be paid not less than the applicable journeyman's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

(5) *Compliance with Copeland Act requirements.* The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

(6) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may be appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) *Contract termination: debarment.* A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) *Compliance with Davis-Bacon and Related Act requirements.* All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) *Disputes concerning labor standards.* Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) *Certification of Eligibility.* (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) *Contract Work Hours and Safety Standards Act.* The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract subject to the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or § 4.6 of Part 4 of this title. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or

permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is greater.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in subparagraph (1) of this paragraph, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in subparagraph (1) of this paragraph, in the sum of $10 for each calendar day or which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1) of this paragraph.

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2) of this paragraph.

(4) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraphs (1) through (4) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in subparagraphs (1) through (4) of this paragraph.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

§ 5.6 Enforcement.

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts subject to the labor standards provisions of the Acts contained in § 5.1. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require the recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency insures that the clauses required by § 5.5 and the appropriate wage determination of the Secretary of Labor are contained in such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5 or unless there is on file with the agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.

(2) Statements of Compliance submitted pursuant to § 5.5(a)(3)(ii) shall be preserved by the Federal agency for a period of 3 years from the date of completion of the contract and shall be produced at the request of the Department of Labor at any time during the 3-year period.

(3) The Federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes listed in § 5.1. Investigations shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans. In making such examinations, particular care shall be taken to determine the correctness of classifications and to determine whether there is a disproportionate employment of laborers, of helpers where they are listed on the wage determination, or conformed under § 5.5(a)(1)(ii), and of apprentices or trainees registered in approved programs. Such investigations shall also include evidence of fringe benefit plans and payments thereunder. Complaints of alleged violations shall be given priority.

(4) In accordance with normal operating procedures, the contracting agency may be furnished various investigatory material from the investigation files of the Department of Labor. None of the material, other than computations of back wages and liquidated damages and the summary of back wages due, may be disclosed in any manner to anyone other than Federal officials charged with administering the contract or program providing Federal assistance to the contract, without requesting the permission and views of the Department of Labor.

(5) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the employee's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the employee. Disclosure of employee statements shall

be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR Part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

(b) The Administrator shall cause to be made such investigations as deemed necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Agency Head with respect to labor standards matters arising under the statutes listed in § 5.1. Federal agencies, contractors, subcontractors, sponsors, applicants, or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigations. The findings of such an investigation, including amounts found due, may not be altered or reduced without the approval of the Department of Labor. Where the underpayments disclosed by such an investigation total $1,000 or more, where there is reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), or where liquidated damages may be assessed under the Contract Work Hours and Safety Standards Act, the Department of Labor will furnish the Federal agency an enforcement report detailing the labor standards violations disclosed by the investigation and any action taken by the contractor to correct the violative practices, including any payment of back wages. In other circumstances, the Federal agency will be furnished a letter of notification summarizing the findings of the investigation.

§ 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments by a contractor or subcontractor total less than $1,000, and where there is no reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations to the Administrator, unless the investigation was made at the request of the Department of Labor. In the latter case, the Federal agency shall submit a factual summary report detailing any violations including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken (such as "letters of notice"), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments by a contractor or subcontractor total $1,000 or more, or where there is reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), the Federal agency shall furnish within 60 days after completion of its investigation, a detailed enforcement report to the Administrator.

(b) *Semi-annual enforcement reports.* To assist the Secretary in fulfilling the responsibilities under Reorganization Plan No. 14 of 1950, Federal agencies shall furnish to the Administrator by April 30 and October 31 of each calendar year semi-annual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts covering the periods of October 1 through March 31 and April 1 through September 30, respectively. Such reports shall be prepared in the manner prescribed in memoranda issued to Federal agencies by the Administrator. This report has been cleared in accordance with FPMR 101–11.11 and assigned interagency report control number 1482–DOL–SA.

(c) *Additional information.* Upon request, the Agency Head shall transmit to the Administrator such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Administrator may find necessary for the performance of his or her duties with respect to the labor standards provisions referred to in this part.

(d) *Contract termination.* Where a contract is terminated by reason of violations of the labor standards provisions of the statutes listed in § 5.1, a report shall be submitted promptly to the Administrator and to the Comptroller General (if the contract is subject to the Davis-Bacon Act) giving the name and address of the contractor or subcontractor whose right to proceed has been terminated, and the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of the contract, and the description of the work to be performed.

§ 5.8 Liquidated damages under the Contract Work Hours and Safety Standards Act.

(a) The Contact Work Hours and Safety Standards Act requires that laborers or mechanics shall be paid wages at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or forty hours in any work week. In the event of violation of this provision, the contractor and any subcontractor shall be liable for the unpaid wages and in addition for liquidated damages, computed with respect to each laborer or mechanic employed in violation of the Act, of $10, for each calendar day or workweek in which such individual was required or permitted to work without payment of required overtime wages. Any contractor or subcontractor aggrieved by the withholding of liquidated damages shall have the right to appeal to the head of the agency of the United States (or the territory or District of Columbia, as appropriate) for which the contract work was performed or for which financial assistance was provided.

(b) *Findings and recommendations of the Agency Head.* The Agency Head has the authority to review the administrative determination of liquidated damages and to issue a final order affirming the determination. It is not necessary to seek the concurrence of the Administrator but the Administration shall be advised of the action taken. Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, and the amount of the liquidated damages computed for the contract is in excess of $500, the Agency Head may make recommendations to the Secretary that an appropriate adjustment in liquidated damages be made or that the contractor or subcontractor be relieved of liability for such liquidated damages. Such findings with respect to liquidated damages shall include findings with respect to any wage underpayments for which the liquidated damages are determined.

(c) The recommendations of the Agency Head for adjustment or relief from liquidated damages under paragraph (a) of this section shall be reviewed by the Administrator or an authorized representative who shall issue an order concurring in the

recommendations, partially concurring in the recommendations, or rejecting the recommendations, and the reasons therefor. The order shall be the final decision of the Department of Labor, unless a petition for review is filed pursuant to Part 7 of this title, and the Wage Appeals Board in its discretion reviews such decision and order; or, with respect to contracts subject to the Service Contract Act, unless petition for review is filed pursuant to Part 8 of this title, and the Board of Service Contract Appeals in its discretion reviews such decision and order.

(d) Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act for a contract is $500 or less and the Agency Head finds that the sum of liquidated damages is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, an appropriate adjustment may be made in such liquidated damages or the contractor or subcontractor may be relieved of liability for such liquidated damages without submitting recommendations to this effect or a report to the Department of Labor. This delegation of authority is made under section 105 of the Contract Work Hours and Safety Standards Act and has been found to be necessary and proper in the public interest to prevent undue hardship and to avoid serious impairment of the conduct of Government business.

§ 5.9 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1, the Federal agency, upon its own action or upon written request of an authorized representative of the Department of Labor, shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

§ 5.10 Restitution, criminal action.

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b), of this section, where violations of the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1 result in underpayment of wages to employees, the Federal agency or an authorized representative of the Department of Labor shall request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of section 1(b)(2) of the Davis-Bacon Act.

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the payment of wage underpayments shall not be requested and the matter shall be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator shall be informed simultaneously of the action taken.

§ 5.11 Disputes concerning payment of wages.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that the contractor and/or subcontractor(s) should also be subject to debarment under the Davis-Bacon Act or § 5.12(a)(1), the letter will so indicate.

(2) A contractor and/or subcontractor desiring a hearing concerning the Administrator's investigative findings shall request such a hearing by letter postmarked within 30 days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute and the reasons therefore, including any affirmative defenses, with respect to the violations and/or debarment, as appropriate.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR Part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 5.12, the Administrator shall notify the contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings, and shall issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor and/or subcontractor(s) disagree with the factual findings of the Administrator or believe that there are relevant facts in dispute, the contractor or subcontractor(s) shall so advise the Administrator by letter postmarked within 30 days of the date of the Administrator's letter. In the response, the contractor and/or subcontractor(s) shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(1)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor and subcontractor(s) (if any) accordingly.

(3) If the contractor and/or subcontractor(s) desire review of the ruling issued by the Administrator under paragraphs (c)(1) or (2) of this section, the contractor and/or subcontractor(s) shall file a petition for review thereof with the Wage Appeals Board within 30 days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with Part 7 of this title.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings and/or ruling shall be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator shall advise the Comptroller General of the Administrator's recommendation in accordance with § 5.12(a)(1). If a timely response or petition for review is filed,

the findings and/or ruling of the Administrator shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Wage Appeals Board.

§ 5.12 Debarment proceedings.

(a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

(b)(1) In addition to cases under which debarment action is initiated pursuant to § 5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in § 5.1 (other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under section 3(a) thereof, the Administrator shall notify by registered or certified mail to the last known address, the contractor or subcontractor and its responsible officers, if any (and any firms in which the contractor or subcontractor are known to have a substantial interest), of the finding. The Adminstrator shall afford such contractor or subcontractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under paragraph (a)(1) of this section or section 3(a) of the Davis-Bacon Act. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or subcontractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter postmarked within 30 days of the date of the letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute. In considering debarment under any of the statutes listed in § 5.1 other than the Davis-Bacon Act, the Administrative Law Judge shall issue an order concerning whether the contractor or subcontractor is to be debarred in accordance with paragraph (a)(1) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge shall issue a recommendation as to whether the contractor or subcontractor should be debarred under section 3(a) of the Act.

(2) Hearings under this section shall be conducted in accordance with 29 CFR Part 6. If no hearing is requested within 30 days of receipt of the letter from the Administrator, the Administrator's findings shall be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

(c) Any person or firm debarred under § 5.12(a)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list. Such a request should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, and shall contain a full explanation of the reasons why such person or firm should be removed from the ineligible list. In cases where the contractor or subcontractor failed to make full restitution to all underpaid employees, a request for removal will not be considered until such underpayments are made. In all other cases, the Administrator will examine the facts and circumstances surrounding the violative practices which caused the debarment, and issue a decision as to whether or not such person or firm has demonstrated a current responsibility to comply with the labor standards provisions of the statutes listed in § 5.1, and therefore should be removed from the ineligible list. Among the factors to be considered in reaching such a decision are the severity of the violations, the contractor or subcontractor's attitude towards compliance, and the past compliance history of the firm. In no case will such removal be effected unless the Administrator determines after an investigation that such person or firm is in compliance with the labor standards provisions applicable to Federal contracts and Federally assisted construction work subject to any of the applicable statutes listed in § 5.1 and other labor statutes providing wage protection, such as the Service Contract Act, the Walsh-Healey Public Contracts Act, and the Fair Labor Standards Act. If the request for removal is denied, the person or firm may petition for review by the Wage Appeals Board pursuant to 29 CFR Part 7.

(d)(1) Section 3(a) of the Davis-Bacon Act provides that for a period of three years from date of publication on the ineligible list, no contract shall be awarded to any persons or firms placed on the list as a result of a finding by the Comptroller General that such persons or firms have disregarded obligations to employees and subcontractors, and further, that no contract shall be awarded to "any firm, corporation, partnership, or association in which such persons or firms have an interest." Paragraph (a)(1) of this section similarly provides that contracts subject to any of the statutes listed in § 5.1 (other than the Davis-Bacon Act) shall not be awarded to "any firm, corporation, partnership, or association" in which a contractor or subcontractor on the ineligible list pursuant to that paragraph has a "substantial interest." A finding as to whether persons or firms whose names appear on the ineligible list have an interest (or a substantial interest, as appropriate) in any other firm, corporation, partnership, or association, may be made through investigation, hearing, or otherwise.

(2)(i) The Administrator, on his/her own motion or after receipt of a request for a determination pursuant to paragraph (d)(3) of this section may make a finding on the issue of interest (or substantial interest, as appropriate).

(ii) If the Administrator determines that there may be an interest (or substantial interest, as appropriate), but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (d)(4) of this section.

(iii) If the Administrator finds that no interest (or substantial interest, as appropriate) exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(iv)(A) If the Administrator finds that an interest (or substantial interest, as appropriate) exists, the person or firm affected will be notified of the Administrator's finding (by certified mail to the last known address), which shall include the reasons therefor, and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue.

(B) Such person or firm shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(C) If no hearing is requested within the time mentioned in paragraph (d)(2)(iv)(B) of this section, the Administrator's finding shall be final and the Administrator shall so notify the Comptroller General. If a hearing is requested, the ruling of the Administrator shall be inoperative unless and until the administrative law judge or the Wage Appeals Board issues an order that there is an interest (or substantial interest, as appropriate).

(3)(i) A request for a determination of interest (or substantial interest, as appropriate), may be made by any interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Government agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards.

(ii) The request shall include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the debarred bidders list has an interest (or a substantial interest, as appropriate) in any firm, corporation, partnership, or association which is seeking or has been awarded a contract of the United States or the District of Columbia, or which is subject to any of the statutes listed in § 5.1. No particular form is prescribed for the submission of a request under this section.

(4) *Referral to the Chief Administrator Law Judge.* The Administrator, on his/her own motion under paragraph (d)(2)(ii) of this section or upon a request for hearing where the Administrator determines that relevant facts are in dispute, will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such hearings as may be necessary to render a decision solely on the issue of interest (or substantial interest, as appropriate). Such proceedings shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(5) *Referral to the Wage Appeals Board.* If the person or firm affected requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Wage Appeals Board to render a decision solely on the issue of interest (or substantial interest, as appropriate). Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 7.

§ 5.13 Rulings and interpretations.

All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to Part 1 of this subtitle, of the rules contained in this part and in Parts 1 and 3, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210.

§ 5.14 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.

The Secretary of Labor may make variations, tolerances, and exemptions from the regulatory requirements of this part and those of Parts 1 and 3 of this subtitle whenever the Secretary finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship. Variations, tolerances, and exemptions may not be made from the statutory requirements of any of the statutes listed in § 5.1 unless the statute specifically provides such authority.

§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

(a) *General.* Upon his or her own initiative or upon the request of any Federal agency, the Secretary of Labor may provide under section 105 of the Contract Work Hours and Safety Standards Act reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of that Act whenever the Secretary finds such action to be necessary and proper in the public interest to prevent injustice, or undue hardship, or to avoid serious impairment of the conduct of Government business. Any request for such action by the Secretary shall be submitted in writing, and shall set forth the reasons for which the request is made.

(b) *Exemptions.* Pursuant to section 105 of the Contract Work Hours and Safety Standards Act, the following classes of contracts are found exempt from all provisions of that Act in order to prevent injustice, undue hardship, or serious impairment of Government business:

(1) Contracts of $2,000.00 or less.

(2) Purchases and contracts other than construction contracts in the aggregate amount of $2,500.00 or less. In arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising.

(3) Contract work performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: A State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam;

Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island;

(4) Agreements entered into by or on behalf of the Commodity Credit Corporation providing for the storing in or handling by commercial warehouses of wheat, corn, oats, barley, rye, grain sorghums, soybeans, flaxseed, rice, naval stores, tobacco, peanuts, dry beans, seeds, cotton, and wool.

(5) Sales of surplus power by the Tennessee Valley Authority to States, counties, municipalities, cooperative organization of citizens or farmers, corporations and other individuals pursuant to section 10 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 8311).

(c) *Tolerances.* (1) The "basic rate of pay" under section 102 of the Contract Work Hours and Safety Standards Act may be computed as an hourly equivalent to the rate on which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 207), as interpreted in Part 778 of this title. This tolerance is found to be necessary and proper in the public interest in order to prevent undue hardship.

(2) Concerning the tolerance provided in paragraph (c)(1) of this section, the provisions of section 7(d)(2) of the Fair Labor Standards Act and § 778.7 of this title should be noted. Under these provisions, payments for occasional periods when no work is performed, due to vacations, and similar causes are excludable from the "regular rate" under the Fair Labor Standards Act. Such payments, therefore, are also excludable from the "basic rate" under the Contract Work Hours and Safety Standards Act.

(3) See § 5.8(c) providing a tolerance subdelegating authority to the heads of agencies to make appropriate adjustments in the assessment of liquidated damages totaling $500 or less under specified circumstances.

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship or training programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice or trainee comes within the definition contained in § 5.2(n).

(iii) The time in question does not involve productive work or performance of the apprentice's or trainee's regular duties.

(d) *Variations.* (1) In order to prevent undue hardship, a workday consisting of a fixed and recurring 24-hour period commencing at the same time on each calendar day may be used in lieu of the calendar day in applying the daily overtime provisions of the Act to the employment of firefighters or fireguards, under the following conditions: (i) Where such employment is under a platoon system requiring such employees to remain at or within the confines of their post of duty in excess of 8 hours per day in a standby or on-call status; and (ii) if the use of such alternate 24-hour day has been agreed upon between the employer and such employees or their authorized representatives before performance of the work; and (iii) provided that, in determining the daily and the weekly overtime requirements of the Act in any particular workweek of any such employee whose established workweek begins at an hour of the calendar day different from the hour when such agreed 24-hour day commences, the hours worked in excess of 8 hours in any such 24-hour day shall be counted in the established workweek (of 168 hours commencing at the same time each week) in which such hours are actually worked.

(2) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully both the unpaid wages due laborers and mechanics and the liquidated damages due the United States, the available funds shall be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, shall be used for the payment of liquidated damages.

(3) In the performance of any contract entered into pursuant to the provisions of 38 U.S.C. 620 to provide nursing home care of veterans, no contractor or subcontractor under such contract shall be deemed in violation of Section 102 of the Contract Work Hours and Safety Standards Act by virtue of failure to pay the overtime wages required by such section for work in excess of 8 hours in any calendar day or 40 hours in the workweek to any individual employed by an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive days for the purpose of overtime compensation and if such individual receives compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less than 1½ times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

§ 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.

(a) Notwithstanding the provisions of § 5.5(a)(4)(ii) relating to the utilization of trainees on Federal and federally assisted construction, no contractor shall be required to obtain approval of a training program which, prior to August 20, 1975, was approved by the Department of Labor for purposes of the Davis-Bacon and Related Acts, was established by agreement of organized labor and management and therefore recognized by the Department, and/or was recognized by the Department under Executive Order 11246, as amended. A copy of the program and evidence of its prior approval, if applicable shall be submitted to the Employment and Training Administration, which shall certify such prior approval or recognition of the program. In every other respect, the provisions of § 5.5(a)(4)(ii)—including those relating to registration of trainees, permissible ratios, and wage rates to be paid—shall apply to these programs.

(b) Every trainee employed on a contract executed on and after August 20, 1975, in one of the above training programs must be individually registered in the program in accordance with Employment and Training Administration procedures, and must be paid at the rate specified in the program for the level of progress. Any such employee listed on the payroll at a trainee rate who is not registered and participating in a program certified by ETA pursuant to this section, or approved and certified by ETA pursuant to § 5.5(a)(4)(ii), must be paid the wage rate determined by the Secretary of Labor for the classification of work actually performed. The ratio of trainees to journeymen shall not be greater than permitted by the terms of the program.

(c) In the event a program which was recognized or approved prior to August 20, 1975, is modified, revised, extended, or renewed, the changes in the program or its renewal must be approved by the Employment and Training Administration before they may be placed into effect.

§ 5.17 Withdrawal of approval of a training program.

If at any time the Employment and Training Administration, determines, after opportunity for a hearing, that the standards of any program, whether it is one recognized or approved prior to August 20, 1975, or a program subsequently approved, have not been complied with, or that such a program fails to provide adequate training for participants, a contractor will no longer be permitted to utilize trainees at less than the predetermined rate for the classification of work actually performed until an acceptable program is approved.

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Friday
August 14, 1981

Part IX

Department of Agriculture

Food and Nutrition Service

Food Distribution Program

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 250

Food Distribution Program

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule sets forth revisions to the requirements which permit distributing agencies, subdistributing agencies, and recipient agencies to employ commercial facilities to process USDA-donated foods by converting them into different end products or by repackaging them. The provisions prescribed in this rule will ensure that food processors pass on maximum benefits of donated foods to recipient agencies and that processing activities are conducted in a manner which maintains maximum accountability and integrity of the donated foods provided by the Food and Nutrition Service (FNS).

EFFECTIVE DATE: August 14, 1981.

FOR FURTHER INFORMATION CONTACT: Gwena Kay Tibbits, Chief, Program Monitoring and Policy Development Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447-8386.

The Final Impact Statement describing the options considered in developing this final rule and the impact of implementing each option are available on request from the above named individual.

SUPPLEMENTARY INFORMATION: FNS has determined that this action meets none of the criteria listed in the definition of "major rule" in Executive Order 12291. While the value of the USDA-donated foods that are already subject to commercial processing under previous regulations exceeds $100 million, the effect of these amendments will be that schools and institutions can receive additional and more varied end products costing less than equivalent commercial products. In addition, while slight increases in distributing agencies' costs of supervising processing activities may result from the amendments, State Administrative Expense funds, provided in accordance with section 7 of the Child Nutrition Act of 1966, may be used to assist distributing agencies with these cost increases. Further, the amendments will result in increased processing activities, thereby enhancing competition, employment, innovation and productivity.

G. William Hoagland, Administrator of the Food and Nutrition Service (FNS), has determined that this action will not have a significant economic impact on a substantial number of small entities. The primary purpose of these rules is to improve administration of the Food Distribution Program by (1) increasing State agency monitoring responsibilities, (2) requiring certification and inspection of certain end products and (3) improving accountability. Increased costs for processors should be minimal because the changes required by this rule are cost effective.

State agencies, school food authorities and commercial processors of USDA-donated foods have all expressed concern about the lack of detailed and definitive guidelines concerning processing contracts. Therefore, these final rules become effective immediately upon publication so that they may be implemented as early as possible during the school year which begins July 1, 1981.

The information collection requirements contained in this final rule are subject to review under the Paperwork Reduction Act of 1980 and have submitted to the Office of Management and Budget (OMB). They will not become effective until OMB clearance has been obtained.

Introduction

The regulations for food distribution permit distributing agencies, subdistributing agencies, and recipient agencies to contract with commerial facilities to process USDA-donated foods into different end products or by repackaging them. This authority has existed since the regulations were first issued in October 1958, but only since the early 1970's has FNS taken an active role in encouraging donated-food processing after the foods have been made available to the State level. The impetus for this encouragement came from changes in child nutrition legislation guaranteeing a designated level of commodity assistance based on meals served within each State.

As the supply of agricultural commodities became more constant, States and schools saw the opportunity to convert donated products into more convenient or table-ready forms. This change has helped expand donated-food use from a limited number of commodities to a broader array of products processed from commodities. For example, a quantity of donated flour becomes a quantity of bread, crackers, cookies, pizzas, and of many other precooked or ready-to-serve items.

As the food distribution program has taken on new dimensions, State agencies, schools, and the food industry have become more involved in processing activities. As of July 1980, 41 agencies had processing contracts with about 420 food companies. During school year 1980, the value of school entitlements for donated foods amounted to approximately $707 million. In addition to the entitlements, price-supported foods valued at nearly $132 million were donated to schools in school year 1980. Section 416 foods are particularly suitable for processing. While flour is probably the largest single item converted, cheese and other dairy items, peanut products, oils, meat and poultry, and many other donated foods, also lend themselves to processing. FNS does not currently have any available data on the volume of donated foods being processed, but estimates that it may be as much as 20 percent of the total amount distributed.

Processing contracts have come under close scrutiny as a result of a national audit conducted in fiscal year 1978 by the Department of Agriculture's Office of the Inspector General (OIG). The audit, which was requested by FNS, included 18 firms doing business with 10 State agencies in 5 of the 7 FNS Regions. OIG's report of its comprehensive audit was released on March 29, 1979, and revealed significant problems in the receipt, use and disposition of donated foods by commercial processors. These regulations reflect FNS's desire for stricter contractual provisions, improved accountability, increased monitoring requirements, and overall clarification of processing regulations.

Analysis of Comments

On June 24, 1980, FNS published a comprehensive and detailed proposal concerning the processing of USDA-donated foods (45 FR 42303–42312). FNS invited careful public scrutiny of that proposal and encouraged detailed written criticism and comment. A total of 90 days was afforded the general public in which it could comment on the proposed rule. A total of 155 comments was received by FNS.

In addition to inviting comments on the proposed regulations, several on-site reviews of processing plants were conducted by FNS in conjunction with the Food Safety and Quality Service (Meat, Dairy, and Fruit and Vegetable Grading Branches) and with the Federal Grain Inspection Service. The purpose of the reviews was to determine if the requirements outlined in the proposed regulations will lead to the desired accountability for which they were intended. The proposed regulations were discussed at various meetings with

representatives from the FNS Regional Offices, State distributing agencies, and processing companies.

FNS also conducted a workshop in which representatives from various States, Food Safety and Quality Service, Federal Grain Inspection Service, and FNS Regional Offices participated. The purpose of the workshop was to analyze comments received concerning the proposed regulations.

This preamble articulates the basis for significant changes from the June 24, 1980 proposal. The reasons supporting the provisions of the June 24 proposal which are unchanged by the final rule were carefully examined in light of the comments to determine the continued applicability of each justification. Unless otherwise stated, the rationale contained in the proposal should be regarded as the basis for the pertinent final rule. Thus, a thorough understanding of the grounds for the final rule requires reference to the June 24, 1980 publication.

Definitions

Contract Value of the Donated Foods. Section 250.14(b)(2) of the proposed regulations defined contract value of the donated foods as (i) the Department's cost of acquiring and delivering the donated foods to be processed based on the most recent data provided by the Department on the date a processing contract is signed, or (ii) the processor's documented cost of purchasing foods meeting or exceeding the donated foods' specifications as of that date as determined by the applicable Federal acceptance service or by a method acceptable to such service.

Eleven comments were received concerning the definition of contract value of the donated foods. The value of the donated foods established in a contract is the basis for crediting recipient agencies for the donated food content of the end products purchased under a processing contract or for establishing the amount to be paid to a contracting agency when a processor is unable to return donated foods.

Four commenters expressed the opinion that only the USDA value should be utilized for contract purposes and that the USDA value should be published and provided by USDA at least quarterly to all distributing agencies. The commenters indicated that any reduction in value of the donated foods could adversely affect the entitlement figures of the contracting agency. The commenters also believed that by requiring processors to use the USDA value, all contracts would be negotiated on a more equitable basis.

Several commenters were opposed to the use of the USDA value of donated food for contract purposes. They stated that in many instances, processors can purchase foods meeting or exceeding the donated food specification at a lower price than the USDA purchase price. The commenters stated that by requiring them to use the USDA figure, the sale price of the processed items would be artificially inflated in order to accommodate the designated figure.

One commenter stated that the distributing agency of a State may not even be a party to the contract, and requested that the contracting agency and processor negotiate the best return value for the donated foods supplied.

Section 250.3 of the final regulations defines contract value of the donated foods as: (1) the Department's cost of acquiring and delivering the donated foods to be processed based on the most recent data provided by the Department on the date a processing contract is signed, or (2) the processor's most recent data documenting the cost of purchased foods meeting or exceeding the donated foods' specifications delivered to the processing plant.

This revision provides the processor with two methods for determining contract value of the donated foods, to be approved by the distributing agency. However, in instances when the contract value of donated foods is approved at a lower value than the Department's cost of acquiring and delivering such foods on the date a processing contract is signed or subsequently revised, the processor shall be required to maintain records to substantiate the lower delivered cost and that the food purchased meets or exceeds the donated food specifications. These records shall be maintained for a period of three years. FNS may, by written notice, require longer retention of any records necessary for resolution of an audit or of any litigation.

Distributor

Section 250.14(b)(5) of the proposed regulations defined distributor as a commercial food purveyor or handler who is independent of a processor and sells end products to recipient agencies.

Two comments were received regarding the definition of a distributor. Commenters stated that the definition as worded minimized the importance of the distributor's role because the definition did not reflect the recordkeeping functions of the distributor. One commenter requested that the definition be expanded to allow a distributor to deliver products on a fee for service basis, which means assessing the recipient agency for the handling charges of the delivery only.

In Section 250.3 of the final regulations the definition of distributor has been expanded to reflect more accurately the responsibility of the distributor to sell and bill delivered end products to recipient agencies.

Processor

Processor was defined under Section 250.14(b)(11) of the proposed regulations as a commercial or institutional facility, other than a food service management company, which processes or repackages donated foods.

One comment was received requesting that the words "institutional facility" be removed from the definition of "processor" so that public and private nonprofit schools and institutions which process donated foods on behalf of other recipient agencies would not be subject to the same stringent provisions as commercial facilities. Since the proposed regulations did not intend that such noncommercial processing be affected by the new provisions, the term "or institutional" has been deleted from the definition in Section 250.3 of the final regulations. This will permit institutions to continue processing donated foods and not be subject to the terms and conditions of the processing provisions set forth in § 250.15(d) of the final regulations.

Processing State Plan of Operations

Date of Submission of the Processing State Plan of Operations

Section 250.14(c) of the proposed regulations required submission of a Processing State Plan of Operations by distributing agencies to FNS not later than May 15, 1981 and not later than May 15 of each subsequent fiscal year. Approval of the Processing State Plan by FNS will be a prerequisite to distributing agencies' approval of any processing agreements.

Seven comments were received expressing concern that approval of processing contracts could be delayed pending submission and approval of State Plans for fiscal year 1982. Two commenters were definitely opposed to the development of the Processing component of the State Plan until regulations are final. One commenter stated that the State Plan should coincide with the school year calendar instead of the fiscal year.

FNS has decided that only the Processing Plan of Operations will be required for School Year 1982. There will be no overall State Plan for Food Distribution for Fiscal Year 1982.

Meanwhile, the Department is requiring under § 250.6(w) of these final regulations that a Processing Plan of Operations be submitted to FNS for approval within 90 days of the publication of these final rules and by May 15 of each subsequent year. All references to the processing component of the State Plan in the proposed rules have been revised to reflect this change in the final rules. Once final regulations are published requiring the submission of a State Plan of Operations for Food Distribution, the Processing Plan of Operations will become a component of the State Plan.

As a result of ongoing audits of processing activities, numerous deficiencies have been identified which have placed FNS under scrutiny by the Office of the Inspector General and Congress. The Processing State Plan will provide FNS with a means to assess processing activities within the State.

Since numerous deficiencies in processing are still being identified, FNS feels that it is imperative to implement the Processing Plan of Operations as expeditiously as possible. For School Year 1982 State distributing agencies may approve contracts prior to approval of this Plan provided that the terms and conditions of the contract are in compliance with § 250.15(d) of this part. For future years, since the majority of processing agreements terminate on June 30, submission and approval of State Plans should not result in delays in contract approvals. If Processing Plans of Operations are submitted to the Regional Office by May 15, and the Regional Office approves the Plan in 45 days, processing contracts may be approved beginning July 1.

Processing Contract Manual

Section 250.14(c)(1)(iii) of the proposed regulations required State distributing agencies to develop and provide a processing manual or similar procedural material for guidance to contracting agencies, recipient agencies and processors to be included as part of the State Plan.

Sixteen comments were received expressing a desire for guidance from FNS in developing the processing manual which was required in the proposal. Several comments strongly favored developing the processing contract manual apart from the State Plan, so that changes would not require amendments to the Plan. Three commenters felt that the requirement for a processing manual should be eliminated.

Due to the time constraints placed on the State distributing agencies for the development and submission of the Processing Plan of Operations, FNS decided to delete the requirement for submission of the manual as part of the Plan. However, the State distributing agency must develop and provide a processing manual or similar procedural material for guidance to contracting agencies, recipient agencies and processors. This guidance material will be provided to processors within 60 days of approval of the annual agreement by the State distributing agency in accordance with § 250.15(t). This material will also be provided to recipient agencies and contracting agencies within 60 days of approval of the annual agreement to receive donated commodities by the State distributing agency.

Standard Form Contract

State distributing agencies were required under § 250.14(c)(1)(ii) of the proposed regulations to provide a copy of the standard processing contract(s) being utilized within the State. The standard form contracts were to be submitted as part of the Processing Plan of Operations.

Three commenters recommended that FNS develop a standard form contract to be distributed to all distributing agencies outlining minimum contractual provisions to ensure compliance with the regulations. Several commenters recommended that contracts used by recipient agencies contain the same provisions as those contained in the State contract(s).

FNS is providing guidelines for minimum contractual requirements under § 250.15(d) of the final regulations. In order to permit State distributing agencies and recipient agencies to comply with applicable State and local laws, however, the final regulations do not reflect a change from the proposed regulations. Flexibility must be mantained in order to accommodate the specific needs of the individual States.

Monitoring

State distributing agencies would be required under § 250.14(c)(1)(iv) of the proposed regulations to include as part of the Processing Plan of Operations the manner in which the distributing agency will monitor processing activities.

This particular section of the Processing Plan generated many comments of concern. While the majority of the commenters favored an increased monitoring requirement for processing activities, they requested specific guidelines from FNS to help them conduct reviews more objectively. One commenter felt that FNS should be in charge of monitoring all processing activity, with the States having no responsibility for this function whatsoever. Several commenters recommended that FNS monitor the activities of multi-State contracts or allow the States to work out cooperative interstate monitoring activities to eliminate duplication of effort. Another commenter felt that the idea of monitoring requirement was a procedural burden that will create hardships for the States as well as the processors. That same commenter stated that processing would be eliminated if all the new requirements were mandated.

FNS is in the process of collecting data to determine the extent of monitoring of processing activities currently taking place. By examining forms currently used by distributing agencies, a suggested review format will be developed for distribution to the State distributing agencies for guidance in conducting reviews. Plans are also underway for the FNS national office to coordinate reviews with its Regional Offices of processors holding multi-State agreements. The results of these reviews will be distributed to all appropriate parties in an attempt to eliminate duplication of effort among contracting agencies.

Section 250.15(b)(1)(iii) of the final regulations retains the requirement for State distributing agencies to monitor processing activities. FNS feels that it is imperative that processing activities be monitored so that deficiencies can be identified and corrected on an ongoing basis. Onsite reviews of processing activities provide the best possible means to accomplish this monitoring.

Requirements for Processing Contracts

Permissible Contractual Arrangements

Section 250.14(d)(1) of the proposed regulations permitted the State distributing agency to contract for processing, pay the processing fee and deliver the end products to recipient agencies through its own distribution system.

Four commenters recommended that such a fee for service arrangement be expanded to include subdistributing agencies and recipient agencies. Those same commenters felt that the fee arrangement as written was too restrictive. They believed recipient agencies should be able to make payments directly to a processor. Several commenters also indicated that many State distributing agencies are funded in such a way that it would be impossible to pay the processing fee for an entire State.

The proposed regulations were intended to permit a subdistributing agency or a recipient agency to enter into processing agreements on a fee for service basis. Clarifying language has, therefore, been added in § 250.15(c)(1) of the final regulations.

It was suggested by one commenter that the processor should disclose the base price of end products (cost of end products using other than donated commodities) to the distributing agency to allow the recipient agencies to determine the processor's profit margin. Four commenters favored the processor listing Free on Board price or distributors' price list for products in an area.

The final regulations do not require that this information be provided for purposes of contract approval. To require a base price or a distributors' price list for a specific area would be detrimental to the processing program. FNS has been informed that many processors would not participate in the processing program if required to furnish information which could result in loss of contracts for processors.

One commenter was in favor of requiring bid procedures for the procurement of processed food items.

Because USDA-donated foods are not subject to the provisions of Attachment O of OMB Circular A–102, the regulations do not require competitive bidding, but neither do they prohibit contracting agencies from utilizing such a system to ensure the most efficient and economical processing.

A commenter asked who is responsible for contractual compliance when a subdistributing agency or recipient agency enters into a contract. One commenter felt that a distributing agency should not be able to refuse a processing contract to any processor. This commenter said that if a recipient agency wishes to enter into a contract and maintain the required records, the distributing agency should have nothing to say about it.

The State distributing agency is responsible for all commodities delivered for the State's use and must assure that all processing activities are performed in compliance with the final regulations; therefore, the State distributing agency must approve all processing agreements. If the processor supplies the distributing agency with all required information and the processed food item can be used in the required child nutrition program meal patterns, it is anticipated that no reasonable request for a contract would be denied. Therefore, the final regulations have not been revised in this respect.

Description of End Products Produced

Proposed § 250.14(e)(4)(ii) required the processor to furnish a description of each end product to be processed, the quantity of each donated food, and the aggregate quantity of all other foods needed to yield a specific unit of each end product, including all conversion and processing loss factors pertaining to the donated food(s).

Six commenters recommended that this section be revised to require a listing of all other ingredients utilized in the production of a specific unit of end product with only flavorings and seasonings listed as an aggregate quantity, as currently required in § 250.6(m). Based on the comments received, § 250.15(d)(4)(ii) of the final regulations requires a listing of all ingredients utilized in a specific end product with only flavorings and seasonings listed as an aggregate total. This change was adopted in order to assist the State distributing agencies to evaluate more fully and approve data submitted on a price and yield schedule, a necessary component of any processing contract.

Subcontracting

Section 250.14(e)(5) of the proposed regulations prohibited the processor from assigning the processing contract or delegating any aspect of processing under a subcontract or other arrangement without the written consent of the contracting agency and the distributing agency.

Subcontracting is standard business procedure in which a processor assigns or delegates any portion of the manufacturing process to another processor(s).

There were mixed comments on whether FNS should permit the use of subcontracts as provided for in the proposal. One commenter recommended that subcontracting be prohibited altogether while two commenters recommended that these provisions be retained.

The use of subcontracts will be permitted with written concurrence from the distributing agency in accordance with § 250.15(d)(5) of the final regulations. In the highly technical and specialized food industry, it is often advantageous to have one manufacturer produce a component of an end product with final assembly accomplished by another processor. By incorporating the special capabilities of each processor, a contracting agency can provide a high quality end product at a reasonable price to the recipient agencies.

Agreement Renewal

Providing that contract performance has been satisfactory, § 250.14(e)(1) of the proposed regulations permitted the renewal of contracts for additional periods of not more than one year by mutual agreement of all parties and upon written approval by the distributing agency.

Three commenters advised that in order to renew a processor's agreement for a one year period, the company must have performed in full compliance the previous year. Another commenter requested requiring an annual accounting report of the processor by the distributing agency at the close of the year.

The proposed regulations provided that contracts may be renewed for additional periods of not more than one year by mutual agreement of all parties and upon written approval by the distributing agency, provided that contract performance has been satisfactory.

The State distributing agency is required under § 250.15(d)(1) of the final regulations to assess the processor's performance annually. Such an assessment can be accomplished by any means set forth by the distributing agency, including annual accounting reports.

Thus, there has been no revision to the proposed regulations concerning agreement renewal.

Performance Bonding

The processor was required under § 250.14(e)(1)(viii)(B) to furnish to the contracting agency prior to the delivery of any donated foods for processing a performance supply and surety bond or an irrevocable letter of credit payable in an amount acceptable to the distributing agency.

Tweny-seven commenters were opposed to the requirement for bonding as it appeared in the proposed regulations. Nine commenters felt that bonding is far too costly a means of insurance which will ultimately drive the cost of end products higher for all recipient agencies. It was also pointed out by seven commenters that it is very difficult for a small business concern to obtain a bond and requiring one would be discriminatory to that particular group of processors.

One commenter felt that no bond should be required if the commodities provided to the processor are valued at less than $1,000. Twelve comments were received which recommended different types of bonding depending on the volume of processing, the commodities

being processed and the nature of the end products being produced. One commenter specified that the minimum amount of a bond should be $25,000 and the maximum bond request be valued at $250,000. The majority of the commenters recommended the use of alternative methods of insurance covering the value of the donated foods in inventory at any particular time. Commenters recommended that alternative means of bonding should be explained by FNS.

Based on these comments, FNS has included in § 250.15(d)(4)(viii)(B) of the final regulations alternative means of insurance that may be utilized or requested by a distributing agency to protect the value of donated foods supplied to processors. The distributing agency will be held liable by FNS for any donated foods provided to a processor.

However, FNS recommends the use of bonding whenever possible, since past experience has shown this widely used practice to be a very effective means of protection for the value of commodities.

End Products Sold by Processors

Listing of Recipient Agencies

Section 250.14(f)(3) of the proposed regulations required a distributing agency to provide a processor with a listing of all recipient agencies eligible to purchase end products under the contract.

Two commenters felt that providing processors with a list of all recipient agencies was time-consuming and costly. It was recommended that lists need only be furnished upon request by a particular processor. On the other hand, one commenter felt that a list of all recipient agencies should be provided to all distributors as well as all processors.

The provision remains the same under § 250.15(e)(3) of the final regulations because FNS believes that such information is readily accessible to the distributing agencies. Provision of these lists is also necessary to ensure that processed end products are received only by eligible recipient agencies. Lists are essential when distributing end products containing nonsubstitutable foods to prevent ineligible recipient agencies from receiving them.

Pricing Structure

Section 250.14(f)(1) of the proposed regulations required that the processing contract should include the processor's established wholesale price schedule for quantity purchases of specified units of end products.

Concerning the pricing structure which is required in this section, one processor commented that prices will vary among eligible recipient agencies, depending on such variables as volume discounts, bid prices, and delivery charges. That same processor stated that a processor could not declare a price that would apply to all recipient agencies within a State.

Section 250.15(e)(1) of the final regulations require the processor to supply a wholesale price schedule because, while prices may vary as to different recipient agencies receiving the same processed end product, figures must be furnished in order to guarantee that the contract value of the donated foods is received by all recipients. The difference in the price of an item produced from a processor's ingredients and one produced from USDA donated ingredients will remain constant.

End Products Sold by Distributors

Discount/Refund System for Payment of Processed End Products Sold Through Distributors

Section 250.14(g) of the proposed regulations required that when a processor transferred end products to one or more distributors for sale and delivery to recipient agencies, such sales should be only under a refund system. The processor would make refund payments directly to the recipient agencies.

This section received more comments than any other in this regulation package. Eighty-nine commenters opposed a refund system (see definition in § 250.3) for processed food items sold by a distributor. Thirty-four commenters felt that a refund system when a distributor is used would be more costly than the discount system (see definition in § 250.3) and would disrupt operations that have taken place for years. It was believed by many commenters that this system would tie up the school system's money until the company made refunds equal to the value of donated foods contained in the end product.

Forty-one commenters were opposed to the refund system because they believe it involves excessive bookkeeping and is time-consuming. The commenters explained that for a large school district with two hundred schools, the central office would have to obtain invoices from all the units and perform a manual tally before they would even have the data to complete a refund application.

In lieu of the proposed system, thirty-seven commenters felt that the choice as to whether processed food items are to be sold through distributors on the refund or discount system should be permitted if clear accountability of the donated foods can be assured. The aforementioned comments represented the majority of responses to this particular issue.

If the refund system is required when a distributor is used, many commenters had reservations as to how the system would work. One stated that the refund system would work in a situation where unlimited substitution of donated foods was permitted. Three commenters requested information on how to account for refund payments on their quarterly financial reports to Child Nutrition Directors. Other commenters felt that instead of submitting a refund application for purposes of obtaining the refund, invoices or copies of invoices would more than suffice.

Several commenters who were opposed to the refund system felt that accountability of the donated foods and end products sold to recipient agencies should remain with the processor and distributing agency. They felt that the system as proposed places the recordkeeping burden totally on the recipient agencies. The whole system, as described by two commenters, creates inefficiencies that would offset any benefit of the refund payment. Other respondents who have worked with the refund system claim problems in receiving rebates for applications submitted.

Small businesses claim they will no longer be able to participate in the processing program because their increased costs for clerical personnel and the processing of refund checks will be too great for them to absorb.

Five commenters stated that by maintaining the discount system through a distributor, the schools could immediately obtain the price reductions for processed food items, and also be able to maintain the economy of delivery through established networks. They claim that by increasing the number of items a distributor is able to supply to the schools, the overall cost of particular drop or delivery cost per unit will decrease. They feel the only way for schools to obtain maximum economy of delivery is to have the distributors handle all foods.

One processor stated that if the refund system through a distributor is required, it could affect the rapport between distributors and processors, with the schools suffering the consequences. Through cooperative efforts of the distributing agencies, processors, distributors and recipient agencies, many commenters felt that a system could be devised which would

maintain full value accountability and integrity of the donated foods when processed food items are sold at a discounted price through a distributor.

There are definite advantages and disadvantages to each system. The discount system, which is more popular among the recipient agencies, requires less staff and paperwork for the recipient agencies and does not tie up funds. It also enables the rural and smaller school districts to take advantage of the processing program. The discount system does present problems with accountability. When title to the processed end products passes to the distributor, the processors have difficulty maintaining records which substantiate actual donated food inventory of the commodities contained in those products. Reductions in the donated food inventory can only take place when the processed foods have actually been delivered to eligible recipient agencies. Processors and distributors must coordinate their recordkeeping activities to ensure accurate inventory reporting. Therefore, an accurate accountability of the donated food inventory is difficult to accomplish.

FNS is still recommending the use of the refund system for processed food items sold by distributors. However, § 250.15(f) of the final regulations provide that, with written concurrence from the Regional Office, a distributing agency may permit the use of any other system that will demonstrate and ensure proper accountability for end products sold through distributors.

One commenter stated that many schools would forget to file their refund application requesting payment. Four commenters felt that the processor should not be held responsible for refund payments if the schools do not file a request for a refund. Several processors felt that an attempt should be made at standardizing the refund application if it is going to be requested. They claim that there is a different form utilized by almost every State distributing agency which complicates the task of making timely refunds.

State distributing agencies supply recipient agencies with a listing of approved processors and of methods utilized to determine the donated-food value. It is the responsibility of the recipient agencies to apply for every allowable credit for which they are entitled.

Two commenters also felt that selling processed food items through a distributor at a discount price structure could be accomplished if the distributor were a party to the processing contract. FNS decided that the processors should be held ultimately responsible for the donated foods either in raw or finished product state. They may hold a distributor responsible for end products held in their possession but the distributor need not become a party to the processing contracts.

Distributors' Handling of Only Substitutable Foods

Section 250.14(g) of the proposed regulations required that the sale of processed end products through a distributor could only include donated foods that are substitutable, such as butter, cheese, flour, nonfat dry milk, and other such foods as are specified in § 250.14(h)(i) of the proposed regulations.

Twenty-six comments were received opposing the stipulation that only processed food items containing substitutable foods could be sold through a distributor. If the provision is implemented, it was predicted by many commenters that many processors and school districts would drop out of the processing program. Further, according to those same commenters, many distributors would no longer be able to supply processed items containing non-substitutable commodities to the school districts they service. They claim that many large major city school systems now rely on distributors for the delivery of all processed food items.

As indicated under the previous subject heading, FNS has revised the proposed regulations to allow the distributing agency to approve an alternate system providing for the sale of processed food items produced from non-substitutable foods through distributors. The rationale provided in comments on this issue pointed out that distributors service the total food needs, both for commercially purchased products and those processed from USDA donated commodities, of many schools and districts. If distributors are prohibited from handling products processed from non-substitutable donated foods, either the processors or the schools themselves will have to perform the delivery function.

Two commenters claimed that the use of established prices for non-substitutable food items handled through distributors, in the event it is permitted, could be considered legalized price fixing.

While it is not the position of FNS to lock in prices for processed foods handled through distributors, the value of the donated foods contained in the end products must be guaranteed to the recipient agencies. Furnishing an established price list for non-substitutable food items is not required by the regulations; however, a system which guarantees full value of the donated foods must be outlined by the processor. Use of a price sheet is one means of accomplishing this.

Substitution of Donated Foods With Commercial Foods

Additional Substitutable Items

Section 250.14(h)(1)(2) of the proposed regulations stated that a processing contract may provide for a processor to substitute for designated donated foods a like quantity of the same foods of equal or better quality. The contract must stipulate that only butter, cheese, corn grits, cornmeal, dried beans, dried peas, flour, lentils, macaroni, nonfat dry milk, peanut butter, peanut granules, roasted peanuts, rice, rolled oats, rolled wheat, and spaghetti may be substituted and if substitution takes place, the processor must have documentation that the foods substituted are of domestic origin and at least equal to the minimum specifications of the donated foods.

Ten comments were received recommending that all commodities be substitutable. Two commenters simply wanted the list of substitutable commodities expanded and one commenter felt that only graded meats and poultry should be classified as non-substitutable.

Six commenters felt that if the regulations provide that a processor must document that substituted foods are of equal or better quality to the donated foods supplied, then FNS should provide guidance as to what will be adequate documentation. Several other comenters asked whether processors using substitutable donated foods for their own commercial production would be required to make a physical inventory of such foods, or whether a "book" inventory would be adequate.

It was also stated by several commenters that if the proposed regulations became final, these provisions will restrict processing agreements using non-substitutable commodities to large districts or to distributing agencies handling distribution of end products. Many commenters from smaller districts believed they will not be able to have these items processed.

In instances where several districts turn over inventories of non-substitutable foods to one processor, one processor suggested that processors be able to commingle the total of all the foods for purposes of processing. The processor indicated that having to set up

a run for each individual school system being serviced by a processor is not cost effective. The same processor stated that such a practice is contrary to good business procedures and could not be followed. Also, several commenters indicated that fruits and vegetables are available to processors with similar specifications as those of USDA and that provisions for substituting such donated food items should be added.

Section 250.15(g)(2) of the final regulations allows the State distributing agency to approve requests for additional substitution of commodities by processors upon written request. The processor must demonstrate and ensure in the written request that the commercial foods substituted are of equal or superior quality to the donated foods supplied and are of domestic origin. Such documentation must be maintained by the processor in accordance with § 250.6(r). Upon apporoval by the distributing agency copies of processor requests for additional substitution of commodities must be forwarded to the FNS Regional Office. The burden of proof that the foods substituted meet or exceed the donated food specifications will rest with the processor. These changes were designed to help processors of non-substitutable foods perform their activities in a more cost effective manner with a guarantee that the foods substituted are equal or superior to the donated foods supplied. Processors of preplated meals will benefit from the provisions added above. Further, manufacturers of food items containing both substitutable and non-substitutable items (e.g., pizza) can produce end products without undue restraints that would delay production and ultimately result in higher prices to the recipient agencies they service. However, in no instance will the processor be permitted to substitute meat or poultry items.

Certification by Acceptance Service

Use of Federal Acceptance Service Grading in Plants Processing Non-substitutable Donated Foods

Section 250.14(j) of the proposed regulations required that when meat or poultry items are processed, the processing must be performed in plants under Federal or State meat and poultry inspection programs. Additionally, all processing of donated meats and poultry must be performed under Food Safety and Quality Service (FSQS) acceptance service. For other non-substitutable donated food items, if the dollar value of the commodities represents an acquisition cost to the Department of $15,000 or more, the proposed rules required that processing be performed under continuous acceptance and certification by the applicable Federal acceptance service to prevent unauthorized substitution and to verify that the quanties of donated foods utilized are as specified in the processing contract.

The majority of the commenters felt that requiring acceptance service grading was a good idea for certain commodity processing, but had serious doubts as to whether manpower will be available to accomplish the task. Nine comments were received regarding this issue. Fourteen comments disclosed that the cost of this acceptance service grading is high and will result in higher food prices for the processed items. The proposed regulations were considered overly restrictive by the majority of the commenters.

Two commenters suggested that only when meat and poultry are processed should this requirement be mandatory. Several commenters suggested that the use of acceptance service grading only be required for companies who were found to be guilty of program abuses. Still others recommended that monitoring of processing activities be performed on a spot check basis. Three commenters suggested that acceptance service grading be performed at the request of the distributing agency.

One commenter suggested grading service should be mandatory for all non-substitutable commodities. Other comments dealing with non-substitutable commodities indicated that the $15,000 restriction was extremely arbitrary. Additionally, the manpower availability question was brought up again by the commenters along with the issue of expanding the list of substitutable foods.

Section 250.15(h) of the final regulations requires that acceptance service grading for meat or poultry be performed for processing runs in which the meat or poultry processed is valued at $10,000 or more. The regulations have also been revised to prohibit processors from structuring processing runs in such a manner as to enable the processors to circumvent this requirement.

Further, the requirement for acceptance service grading for non-substitutable commodities other than meat and poultry representing an Acquisition cost to the Department of $15,000 or more has been eliminated in § 250.15(i) of the final regulations. However, the contracting agency may require acceptance and certification by such acceptance service at any time, and for any product if deemed necessary.

FNS has reduced the requirements for acceptance service grading for non-substitutable commodities due to the lack of manpower available for grading activities and the increased cost of end products which would be passed on to the recipient agencies as a result of grading services performed.

Labeling End Products

Labeling

Section 250.14(k) of the proposed regulations required that (1) except when end products contain donated foods that are substitutable, the exterior shipping containers of end products and, where applicable, the individual wrappings or containers of end products must be clearly labeled "contains commodities donated by the United States Department of Agriculture. This product shall be sold only to eligible recipient agencies," (2) labels on all end products must meet applicable Federal labeling requirements, and (3) when a processor makes any claim with regard to an end product's contribution toward meal requirements of any child nutrition program, the processor must follow procedures established by FNS. The Food Safety and Quality Service of the Department, the Federal Grain Inspection Service or the National Marine Fisheries Service of the U.S. Department of Commerce for approval of such labels.

Two commenters felt that the USDA legend on all boxes containing non-substitutable commodities is unnecessary except for meat and poultry products.

Section 250.15(j) of the final regulations retains the requirement that the USDA legend appear on all shipping containers of end products containing non-substitutable donated foods and, where applicable, the individual wrapping or containers of end products to ensure that processed foods containing donated food items be provided to eligible recipient agencies only.

Several commenters favored requiring more nutritional information on the labels of processed food items as guidance to the school food service personnel. Since nutritional labeling is not required on the labels of foods being purchased by USDA for use in the child nutrition programs, FNS does not want to place this burden on the processors due to the increased costs involved.

Refund Payments

Refunds

Section 250.14(m) of the proposed regulations required recipient agencies

to submit refund applications promptly to the distributing agency for verification of eligibility and approval. The distributing agency would then forward the applications to the processor for payment within 30 days after receipt of the applications.

Three commenters felt that the proposed requirement of having the distributing agency review and verify the validity of all refund applications prior to submission to the processors was an unnecessary step creating a greater time lag for payment of the refunds. Five commenters requested that language be introduced to require schools to submit refund applications within 30 days of the reporting month with processors paying the refund within 30–45 days of receipt of the refund applications. It was also believed by several commenters that the amount of time for submission of refund applications at the close of the school year should be reduced to allow the State distributing agencies to close out their records in a more reasonable time frame.

There were no revisions in § 250.15(l) of the final regulations. FNS believes that by requiring the State distributing agency to review the refund applications, only eligible recipient agencies will receive a refund payment.

The processor is given a thirty day period from the date of receipt of the application in which to make the refund payments. The 90-day limit for submission of applications after the close of the school year coincides with the deadline for submission of claims for reimbursement for the National School Lunch and Breakfast programs.

Performance Reports

Section 250.14(o) required that processors submit to distributing agencies monthly reports of performance under each processing contract no later than the final day of the month following the reporting period.

Two commenters felt that the proposed 30 day limit was an unrealistic time frame for processors to have to submit performance reports. One commenter felt that requiring monthly reports from the processor will definitely improve the overall accountability of the program. One comment was made favoring the submisson of reports, but felt that the processor should have forty-five days to submit them. Four commenters felt that too much recordkeeping is required. Several processors felt that they should not be required to submit monthly reports of performance. One commenter stated that FNS should develop a standard form for the required monthly performance report in order that the processors not have to adjust format for each State as they do now.

One comment was received from a school lunch director requesting that the schools not have to keep inventory records of processed donated foods.

Another commenter indicated that there is a need to establish penalties for processors who do not report monthly or whose reports are missing any of the required information. Several distributing agencies felt that having to analyze the data on all performance reports was a burdensome, time-consuming task.

Section 250.15(r) of the final regulations requires processors to submit monthly reports of performance within 30 days of the prior month's processing activity. This data must be available to State distributing agencies in order for them to complete the quarterly processing inventory report required by FNS. To extend the allowable time frame in which to submit performance reports would seriously hamper the State distributing agencies in their attempt to complete other required reports.

FNS believes that processed donated foods should be accounted for even at the recipient agency level. These processed food items should be maintained on the same inventory system as purchased and donated foods used in the preparation of meals for the Child Nutrition Programs as required in § 250.6(r).

If processors do not submit monthly performance reports on time, they are not in compliance with the terms and conditions of the processing contract. A State distributing agency can terminate their agreement if the required reports are not submitted. The only way for a State distributing agency to know if all processors are performing their functions as outlined in the contract is for the distributing agency to review all reports for accuracy and completeness of data submitted within the established time frame.

Inventory Controls

Section 250.14(p) of the proposed regulations required that a distributing agency monitor inventories to ensure that the quantity of donated foods for which a processor is accountable is the lowest cost-efficient level but in no event more than a four-month supply based on the processor's average monthly usage, unless a higher level has been specifically approved by the distributing agency on the basis of a written justification submitted by the processor.

Eleven commenters felt that the maximum 4-month inventory level required in the proposed rules was too restrictive. Thirteen commenters felt that the level of inventory on hand should be 6 months. Ten commenters felt that the level should be raised to 9 months.

One commenter felt that the level of inventory should be determined by the circumstances of the particular processor. One commenter felt that transfers should be allowed without Regional Office permission. Another recommendation from several commenters favored separate national inventory levels for multi-State processors.

As a result of the comments, § 250.15(o) of the final regulations raises the allowable level of inventory on hand to 6 months with a provision for higher levels with written justification from the processor for approval by the State distributing agency. Under no circumstances should the amount of food ordered be in excess of anticipated usage or beyond the processor's ability to accept or store the food at any one time. The major impetus for the change was the fact that a distributing agency must order the donated foods 75 days prior to the anticipated delivery date and this would tie up a two-month level of inventory giving the processor only a two-month working supply. Additionally the minimum carloading amounts of many commodity food items are such that they represent an inventory far in excess of the four-month supply for distributing agencies which have a smaller average daily participation.

Processing Inventory Reports

Section 250.14(q) of the proposed regulations required the distributing agencies to submit to the Regional Office not later than 45 days following the close of each Federal fiscal quarter a report in a form prescribed by FNS showing separate inventory levels for each processor under agreement with contracting agencies within the State.

Eight comments were received recommending that the distributing agencies be given 60 days following the close of each Federal fiscal quarter—rather than 45 days as proposed—to submit the required processor inventory report. The State distributing agencies felt that providing copies of processor reports should be allowable as it is burdensome to require a separate report.

As a result of the comments received, § 250.15(p) of the final regulations requires the submission of the quarterly inventory report not later than 60 days following the close of the Federal fiscal

quarter. This time frame will allow the distributing agencies 30 days past the submission date of processor reports to compile information for their report. If a processor is late with a report, the distributing agency can request the information via telephone and still submit the required report on time.

Cooperation With Administering Agencies for Child Nutrition Programs

Section 250.14(r) of the proposed regulations required that in instances when the distributing agency is not the administering agency for child nutrition programs, the administering agency be provided an opportunity to review contracts for the processing of end products to be used in child nutrition programs.

Three commenters were opposed to the proposal to give the State educational agency (SEA) an option of reviewing processing contracts prior to the distributing agency's approval. They felt that since the distributing agency is a party to the contract and is ultimately responsible for full compliance with all terms and conditions, there is no need to have to obtain SEA concurrence prior to approval of processing contracts.

Section 250.15(r) of the final regulations retains the proposed requirement for many State distributing agencies are under SEA. Collaboration with the administering agency of the child nutrition programs takes place on a daily basis. FNS believes that the administering agency should be aware of all processors and processing activities. The food items produced are used in the programs administered by the SEA and while they may not meet the nutritional standards for reimbursement, they may still be appropriate for use in the program.

General Comments

Twelve comments were received recommending a reordering of the regulations for clarity. They stated that the proposed regulations were extremely difficult to understand.

The Department has, since these proposed regulations were published, issued a Notice of Intent announcing the need for an overall revision of the Food Distribution Program regulations. This notice, published on December 16, 1980 (45 FR 82890–2), announced that the Department intends to restructure these regulations, and public comments were requested by February 17, 1981. The overall revision will include processing requirements.

Two commenters felt that food service management companies should be treated as processors and that they be required to maintain detailed records similar to those required for processors. The regulations were not revised in this regard for foods are usually turned over to a food service management company for on-site preparation of meals produced for the recipient agency. Since the company is acting in behalf of the eligible recipient agency, it is the opinion of FNS that the company should be subject to all the requirements for which the recipient agency is subject and should be required to maintain the same records as any eligible recipient agency.

One commenter felt that schools should not be forced to participate in processing agreements. That same commenter felt that the direct distribution of donated foods is much more beneficial to recipient agencies. It was never the intent of FNS to require any unwilling recipient agencies to participate in the processing program. State distributing agencies have entered into agreements to permit recipient agencies to purchase processed end products at a cost less than they would have to pay on the open market. If a food item is currently being used by a recipient agency, it is to its advantage to try to obtain the item at the lowest possible cost.

One commenter favored the development of maximum yields for the donated foods to be used as a guideline by the State distributing agencies and processors. Another recipient agency requested that it be permitted to help in the writing of specifications for processed food items. Yield figures for the donated foods processed will vary according to the end products produced, the types of facilities being utilized, the volume of processing at any time, and any number of other factors. FNS is conducting studies to determine yield ranges which will be applicable to various processed end products. These ranges should be a good indicator of which companies submit figures which deviate substantially from established norm ranges. Recipient agencies are not prohibited from writing specifications from processed end products in conjunction with the State distributing agency.

One commenter favored abolishing all processing contracts and having the Department enter into national State Option and Cost (SOC) contracts. The States then could have the option of receiving processed donated foods as part of their direct distribution entitlement. They would, in turn, be billed for the processing fee and could recoup the monies from the recipient agencies they serve.

The basic premise behind this concept is that instead of USDA providing commodities only in the raw state, the foods are offered in a more processed form produced under USDA specifications. The distributing agency would pay the difference between the cost of the commodity in its raw state and the cost of the food item in a more processed state.

USDA entered into SOC contracts several years ago on a test basis. For example, recipient agencies could receive frozen whole turkeys as they had always received them, or they could receive fully cooked turkey rolls for which they would be billed a rate per pound. The project was successful for those distributing agencies with monies available to pay the charges for the further processing. It was difficult for many distributing agencies to participate because they did not have the funds to pay the processing fee nor the means to bill recipient agencies for the additional cost of the commodities. Thus, the proposed regulations were not revised to include SOC contracts. In addition, many commodities are now available in a more fully processed form to all recipient agencies without having to assess the distributing agency for additional costs incurred.

Accordingly, Part 250 is amended as follows:

1. Section 250.3 is amended to include the following definitions:

§ 250.3 Definitions.

"Child nutrition programs" means the National School Lunch Program, the School Breakfast Program, the Summer Food Service Program for Children, and the Child Care Food Program.

"Contract value of the donated foods" means, at the contracting agency's option (a) the Department's cost of acquiring and delivering the donated foods to be processed based on the most recent data provided by the Department on the date a processing contract is signed, or (b) the processor's most recent data documenting the delivered cost of purchased foods meeting or exceeding the donated foods' specifications.

"Contracting agency" means the distributing agency, subdistributing agency, or recipient agency which enters into a processing contract.

"Discount system" means a system whereby a recipient agency purchases end products directly from a processor at an established wholesale price minus the contracted value of donated foods contained in the end products.

"Distributor" means a commercial food purveyor or handler who is independent of a processor and both

sells and bills for the end products delivered to recipient agencies.

"End product" means a product containing any amount of donated foods which have been processed.

"Federal acceptance service" means the acceptance service provided by (a) the applicable grading branches of the Department's Food Safety and Quality Service (FSQS), (b) the Department's Federal Grain Inspection Service, and (c) the National Marine Fisheries Service of the U.S. Department of Commerce.

"Food service management company" means a commerical enterprise or a nonprofit organization which may be contracted with by a recipient agency to manage any aspect of its food service in accordance with § 250.8(b)(3) of this part or in accordance with Part 210.8a of the regulations for the National School Lunch Program.

"Processing" means (a) the conversion of a donated food or donated foods into a different end product or (b) the repackaging of a donated food or donated foods.

"Processing fee" means the amount charged to a contracting agency for a processor's services.

"Processor" means a commercial facility, other than a food service management company, which processes donated foods.

"Performance supply and surety bond" means a written instrument issued by a surety company which guarantees performance and supply of end products by a processor under the terms of a processing contract.

"Refund system" means a system whereby a recipient agency purchases a processor's end products and receives from the processor a payment equivalent to the value of the donated foods contained in the end products.

"Refund application" means an application by a recipient agency in any form acceptable to a distributing agency and processor which certifies purchase of end products and which, upon forwarding to the processor by the distributing agency, obligates the processor to refund the value of the donated food contained in the end products.

2. In § 250.6, paragraphs (n), (r), and (s) are revised, and a new paragraph (w) is added, as follows:

§ 250.6 Obligations of distributing agencies.

* * * * *

(n) *Processing of donated foods.* Distributing agencies, subdistributing agencies, and recipient agencies may employ commercial facilities to process donated foods by converting them into different end products or by repackaging them when such processing is contracted for and performed in accordance with the provisions of § 250.15 of this part. For the fiscal year beginning October 1, 1981, and subsequent fiscal years, distributing agencies, prior to entering into or approving processing contracts, shall submit to and receive from FNS approval of the State Plan of Operations required by paragraph (w) of this section, and one or more standard form contracts meeting the requirements of § 250.15(d) of this part, to be required for use within the State.

* * * * *

(r) *Records.* (1) Accurate and complete records shall be maintained with respect to the receipt, disposal, and inventory of donated foods including (i) end products processed from donated foods and (ii) the determination made as to liability for any improper distribution or use of, or loss of, or damage to, such foods and the results obtained from the pursuit of claims by the distributing agency. Such records shall also be maintained with respect to the receipt and disbursement of funds arising from operation of the distribution program, including the determination as to the amount of payments to be made by any processor, as defined in § 250.3, upon termination of processing contracts. (2) Distributing agencies shall require all subdistributing and recipient agencies to maintain accurate and complete records with respect to the receipt, disposal and inventory of donated foods, including end products processed from donated foods, and with respect to any funds which arise from the operation of the distribution program, including refunds made to recipient agencies by processors in accordance with § 250.15(1) of this part. (3) Distributing agencies shall maintain accurate and complete records with respect to amounts and value of commodities refused by school food authorities in accordance with § 250.4(h) of this part and shall require that school food authorities also maintain such records of refusals. (4) Any processor or other entity which contracts with a distributing agency, subdistributing agency or recipient agency to process, repackage, or prepare any donated foods shall be required to keep accurate and complete records with respect to the receipt, disposal, and inventory of such foods similar to those required of distributing agencies under this paragraph. Where donated foods have been commingled with commercial foods, the processor shall maintain records which will permit an accurate determination of the donated-food inventory. Where the contract value of donated foods, as defined in § 250.3, is lower than the Department's cost of acquiring and delivering such foods on the date a processing contract is signed or subsequently revised, the processor shall be required to maintain records to substantiate the lower delivered cost. In addition, the processor shall be required to keep formulae, recipes, daily or batch production records, loadout sheets, bills of lading, and other processing and shipping records to substantiate the use made of such foods and their subsequent redelivery, in whatever form, to any distributing agency, subdistributing agency or recipient agency. (5) All recipient agencies shall be required to keep accurate and complete records showing the data and method used to determine the number of eligible persons served by that agency. (6) Failure by a distributing agency, subdistributing agency, recipient agency, processor, or other entity to maintain records required by this section shall be considered prima facie evidence of improper distribution or loss of donated foods and the agency, processor or entity shall be subject to the provisions of § 250.6(m) of this part. All such records shall be made available for inspection and review upon request by FNS or by the appropriate distributing agency and shall be retained for a period of three years from the close of the Federal fiscal year to which they pertain. However, FNS may, by written notice, require longer retention of any records necessary for resolution of an audit or of any litigation.

(s) *Reports.* Distributing agencies shall submit (1) monthly reports to the FNS Regional Office covering the receipt and distribution of commodities, (2) quarterly processing inventory reports in accordance with § 250.15(p) of this part, and (3) such other reports covering distribution operations in such form as may be required from time to time by the Department.

* * * * *

(w) *State Plan of Operations for Processing.* (1) Not later than 90 days after publication of these final rules and not later than May 15 of each subsequent fiscal year, each distributing agency shall submit to FNS for approval a State Plan of Operations for Processing. FNS shall provide written approval or denial of the State Plan for Processing or amendment within 45 days of receipt. The State Plan for Processing and all amendments shall be signed by the Chief Officer of the distributing agency. (2) For the fiscal year beginning October 1, 1981, the plan shall meet the

requirements of § 250.15(b). (3) Each distributing agency shall submit its State Plan to Operations for Processing to the State Governor, or his delegated authority, for comment on the relationship of the plan to other State plans and programs. A period of 45 days from the receipt of the State Plan of Operations for Processing shall be afforded for such comments.

§ 250.13 [Amedned]

3. In § 250.13, paragraph (f) is removed and reserved.

4. A new § 250.15 is added as follows:

§ 250.15 Processing of donated foods.

(a) *Purpose.* (1) This section sets forth the terms and conditions under which distributing agencies, subdistributing agencies, or recipient agencies may enter into contracts for processing of donated foods and prescribed the minimum requirements to be included in such contracts. (2) This section does not pertain to food service management companies utilizing donated foods in the preparation of meals.

(b) *State Plan of Operations for Processing.* Each distributing agency wishing to enter into or approve processing contracts shall have an approved State Plan of Operations for Processing required by § 250.6(w) of this part. Approval of the plan shall be prerequisite to approval by the distributing agency of processsing contracts entered into after the date this section becomes effective. For fiscal year 1982, State distributing agencies may approve contracts prior to approval of the State Plan for Processing provided that the terms and conditions of the contract are in compliance with § 250.15(d) of this part.

(1) The State Plan of Operations for Processing shall, as a minimum, include the following:

(i) The methods by which end products are delivered to recipient agencies.

(ii) A copy of the standard processing contract(s) for use within the State.

(iii) The manner in which the distributing agency will monitor processing activities, which shall include (A) the frequency of onsite reviews of processors and contracting agencies planned for the next fiscal year; (B) procedures for reducing any excess inventories of donated foods among processors in accordance with paragraph (o) of this section, and (C) the methods by which the distributing agency will maintain equitable distribution of end products containing donated foods to recipient agencies eligible to receive such foods, in accordance with § 250.6(h) of this part.

(iv) If the distributing agency is not also the administering State agency for child nutrition programs, the manner in which the distributing agency will cooperate with the administering State agency in accordance with paragraph (q) of this section.

(2) Distributing agencies may submit for approval a revised processing State Plan of Operations for Processing or amendments thereto at any time.

(c) *Permissible contractual arrangements.* (1) A distributing agency, subdistributing agency, or recipient agency may contract for processing, pay the processing gee, and deliver the end products to eligible agencies through its own distribution system. (2) A distributing agency or subdistributing agency may contract for processing on behalf of one or more recipient agencies. All recipient agencies eligible to receive the donated foods to be processed may participate in such a processing contract by virtue of the distributing agency/recipient agency agreement required by § 250.6(b) of this part. Under this arrangement processors (i) shall be required to utilize a refund system when they arrange for end products to be sold indirectly to recipient agencies through a distributor unless another system is permitted in accordance with paragraph (f) of this section, (ii) may, with the approval of the distributing agency, utilize either a discount or a refund system when they sell end products directly to recipient agencies or (iii) distributing agency may also allow, with written concurrence from the FNSRO, any other system that can demonstrate and insure proper accountability. (3) A subdistributing agency or recipient agency may also enter into processing contracts with a processor under arrangements similar to those described in paragraph (c) (1) or (2) of this section, provided that the contract has been approved by the distributing agency in accordance with paragraph (m) of this section.

(d) *Requirements for processing contracts.* (1) Contracts with processors shall be in a standard written form approved by FNSRO and shall terminate no later than one year after they have been approved. However, contracts may be renewed for additional periods of not more than one year by mutual agreement of all parties and upon written approval by the distributing agency, provided that contract performance has been satisfactory. (2) Standard form contracts shall be prepared or reviewed by the appropriate State legal staff to assure conformity with the requirements of these regulations and of applicable Federal, State and local laws. (3) The contract shall be signed by the owner, a partner, or a corporate officer duly authorized to sign the contract, as follows:

(i) In a sole proprietorship, the owner shall sign the contract.

(ii) In a partnership, a partner shall sign the contract.

(iii) In a corporation, a duly authorized corporate officer shall sign the contract.

(4) As a minimum, each processing contract shall include:

(i) The names and telephone numbers of the contracting agency and processor.

(ii) A description of each end product to be processed, the quantity of each donated food and any other ingredient which is needed to yield a specific number of each end product, except that distributing, subdistributing or recipient agencies may permit processors to specify the total quantity of any flavorings or seasonings which may be used without identifying the ingredients which are, or may be, components of seasonings or flavorings.

(iii) The contract value per pound of each donated food to be processed and, where processing is to be performed only on a fee-for-service basis, the processing fee to the contracting agency for a specified number, weight or measure of the end products to be delivered.

(iv) A provision for (A) termination of the contract upon thirty days' written notice by the contracting agency or the processor and (B) immediate termination of the contract when there has been noncompliance with its terms and conditions by the contracting agency or the processor.

(v) In the event of contract termination, a provision for disposition of donated foods and end products in processor's inventories or payment of funds in accordance with paragraph (k) of this section.

(vi) A provision for inspection and certification during processing, where applicable, by the appropriate acceptance service in accordance with paragraphs (h) and (i) of this section.

(vii) A provision that end products containing donated foods that are not substitutable under paragraph (q) of this section shall be delivered only to recipient agencies eligible to receive such foods.

(viii) Provisions that the processor shall:

(A) fully account for all donated foods delivered into its possession by production and delivery to the contracting agency or eligible recipient agencies of an appropriate number of units of end products meeting the

contract specifications, and where end products are sold through a distributor, that the processor remains fully accountable for the donated foods until refunds or any other credits equal to their contracted value have been made to eligible recipient agencies in accordance with paragraph (l) of this section;

(B) furnish to the contracting agency prior to the delivery of any donated foods for processing any such document or assurance as is required by the contracting agency to protect itself from liability for the donated foods. The contracting agency may require a performance supply and surety bond, an irrevocable letter of credit payable in an amount acceptable to the distributing agency, an escrow account in an amount acceptable to the distributing agency, or any other means of protecting itself since the distributing (contracting) agency is held liable by FNS for any donated foods provided to a processor.

(C) use or dispose of the containers in which donated foods are received from the Department in accordance with the instructions of the contracting agency;

(D) apply as a credit against the processing fee or return to the contracting agency (*1*) any funds received from the sale of containers, and (*2*) the market value or the price received from the sale of any by-products of donated foods or commercial foods which have been substituted for donated foods;

(E) substitute donated foods with commercially purchased foods only in accordance with paragraph (g) of this section;

(F) meet the requirements of paragraph (j) of this section for labeling end products;

(G) maintain accurate and complete records pertaining to the receipt, disposal, and inventory of donated foods in accordance with § 250.6(r) of this part; and

(H) submit processing performance reports in accordance with paragraph (n) of this section.

(ix) A provision that approval of the contract by the distributing agency shall not obligate that agency or the Department to deliver donated foods for processing.

(5) The processor shall not assign the processing contract or delegate any aspect of processing under a subcontract or other arrangement without the written consent of the contracting agency and the distributing agency.

(e) *End products sold by processors.* When recipient agencies will pay the processor for end products, the contract shall include (1) the processor's established wholesale price schedule for quantity purchases of specified units of end products, (2) an assurance that the price of each unit of end product purchased by eligible recipient agencies shall be discounted by the stated contract value of the donated foods contained therein, or a refund equal to such value made upon proof of purchase by an eligible recipient agency and (3) a provision that the distributing agency shall give the processor a list of all recipient agencies eligible to purchase end products under the contract.

(f) *End products sold by distributors.* When a processor transfers end products to one or more distributors for sale and delivery to recipient agencies, such sales shall be under a refund system. The processor shall make refund payments to such agencies in accordance with paragraph (l) of this section. A distributing agency may permit the use of any other system that can demonstrate and ensure proper accountability, with written concurrence from the FNSRO, for end products sold by distributors.

(g) *Substitution of donated foods with commercial foods.* The processing contract may provide that the processor may substitute for donated foods a like quantity of the same foods of equal or better quality. If such a provision is included, the contract shall stipulate that (1) only butter, cheese, corn grits, corn meal, flour, macaroni, nonfat dry milk, peanut butter, peanut granules, roasted peanuts, rice, rolled oats, rolled wheat, shortening, soybean oil, spaghetti, and such other foods as FNS specifically approves may be substituted and (2) all components of commercial foods substituted for those donated must be of domestic origin and be identical or superior in every particular of the donated-food specification as evidenced by certification performed by, or acceptable to, the applicable Federal acceptance service. When there is substitution in accordance with this paragraph the donated foods may be utilized by the processor in his own commercial product but shall not otherwise be sold or disposed of in commercial channels. The State distributing agency may approve written requests by processors for additional substitution of donated foods, with the exception of meat or poultry items. The processor must demonstrate and ensure in the written request that the commercial foods substituted are of equal or superior quality to the donated foods supplied and are of domestic origin. Such documentation must be maintained by both parties in accordance with Section 250.6(r). Upon approval by the distributing agency, copies of processor requests for additional substitution of commodities shall be forwarded to the regional office. The applicable Federal acceptance service, shall, upon request, determine if the quality analysis meets the requirement set forth by the Agricultural Stabilization and Conservation Services (ASCS) in the original inspection of donated foods, and when donated commodities are non-substitutable, insure against unauthorized substitutions, and verify that quantities of donated foods utilized are as specified in the contract.

(h) *Meat and poultry inspection programs.* When donated meat or poultry products are processed or when any commercial meat or poultry products are incorporated into an end product containing one or more donated foods, all of the processing shall be performed in plants under continuous Federal meat or poultry inspection, or continuous State meat or poultry inspection in States certified to have programs at least equal to the Federal inspection program. If the value of the donated meat or poultry items to be processed under any contract at any one time is $10,000 or more, the processing must be performed under Food Safety and Quality Service (FSQS) acceptance service grading. Under no circumstances shall the processor set up processing runs for the purpose of circumventing this requirement. The cost of this service shall be borne by the processor. In the event that an FSQS inspector is not available or that a school food authority needs product produced on short notice, the State distributing agency may provide the processor with written authority to defer FSQS acceptance service for the specific instance. The processor shall retain all such distributing agency notices on file as part of its production records.

(i) *Certification by acceptance service.* (1) When donated foods (other than meat and poultry) that are not substitutable under paragraph (g) of this section are processed, all processing activities shall be subject to review and audit by the Department, including the applicable Federal acceptance service. The contracting agency may also require acceptance and certification by such acceptance service. (2) Contracting agencies may require that end products processed from substitutable donated foods shall also be subject to such acceptance and certification. In the case of substitutable donated foods, the contracting agency requiring Federal acceptance service should consider the dollar value of the donated foods

delivered to the processor. (3) When contracting agencies require certification in accordance with paragraphs (i)(1) or (2) of this section, the degree of acceptance and certification necessary under the processing contract shall be determined by the appropriate Federal acceptance service after consultation with the distributing agency concerning the type and value of the donated foods and anticipated volume of end products to be processed. The cost of this service shall also be borne by the processor.

(j) *Labeling end products.* (1) Except when end products contain donated foods that are substitutable under paragraph (g) of this section, the exterior shipping containers of end products and, where practicable, the individual wrappings or containers of end products, shall be clearly labeled "Contains Commodities Donated by the United States Department of Agriculture. This Product Shall Be Sold Only to Eligible Recipient Agencies." (2) Labels on all end products shall meet applicable Federal labeling requirements. (3) When a processor makes any claim with regard to an end product's contribution toward meal requirements of any child nutrition program, the processor shall follow procedures established by FNS, the Food Safety and Quality Service of the Department, or the National Marine Fisheries Service of the U.S. Department of Commerce or other applicable Federal agencies for approval of such labels.

(k) *Termination of processing contracts.* (1) When contracts are terminated (i) at the request of a processor, where there has been no fault or negligence on the part of the contracting agency, or (ii) at the contracting agency's request, where there has been noncompliance on the part of the processor with the terms or conditions of the contract, or if any right thereunder in favor of the contracting agency is threatened or jeopardized by the processor, the processor shall at the option of the contracting agency and FNS:

(A) when feasible and with the concurrence of any affected distributing agency(ies), transfer all donated food inventories to other distributing agency(ies) with which the processor has contracted;

(B) return all donated foods unaccounted for or replace them with a like quantity of the same foods of equal or better quality as certified in accordance with paragraph (g)(2) of this section and return such purchased foods at the processor's expense to a destination designated by the distributing agency; or

(C) pay the distributing agency an amount equal to the Department's cost, based on the most recent data provided by the Department, as of the date of termination, of replacing the foods which cannot be returned to the distributing agency.

(2) When contracts are terminated at a contracting agency's request, where there has been no fault or negligence on the part of the processor, the processor shall:

(i) if the donated foods remaining in inventory are non-substitutable, return foods to the contracting agency unless other arrangements are specifically approved by the State distributing agency;

(ii) when feasible and with the concurrence of any affected distributing agency(ies), transfer all substitutable donated food inventories to other distributing agency(ies) with which the processor has contracts;

(iii) return the substitutable donated foods unaccounted for or replace with a like quantity of the same foods of equal or better quality as certified in accordance with paragraph (g)(2) of this section and return such purchased foods to a destination designated by the distributing agency, with transportation charges for such shipments borne by the contracting agency; or

(iv) pay the distributing agency an amount equal to the Department's cost based on the most recent data provided by the Department, as of the date of termination, of replacing the foods which cannot be returned to the distributing ageny or, with FNS approval, pay the distributing agency an amount equal to the stated contract value of donated foods in the processor's inventory.

(3) Funds received by distributing agencies upon termination of contracts shall, at the option of FNS, be (i) used to replace the donated foods in kind, (ii) used by the distributing agency in accordance with § 250.6(k) of this part, or (iii) paid to the Department.

(l) *Refund payments.* (1) When end products are sold to recipient agencies in accordance with the refund provisions of paragraphs (e) or (f) of this section, the contracting agency shall encourage each recipient agency to submit refund applications promptly. In no event shall such applications be submitted later than 90 days after the close of (i) the school year to which they pertain by schools or (ii) the fiscal year to which they pertain by other recipient agencies. (2) The distributing agency shall review each application to verify that the recipient agency is an eligible purchaser and forward the application to the processor within a reasonable length of time. (3) Not later than 30 days after receipt of the application by the processor, the processor shall make a payment to the recipient agency equal to the stated contract value of the donated foods contained in the purchased end products covered by the application.

(m) *Contract approval.* Distributing agencies shall review and approve processing contracts entered into by subdistributing and recipient agencies prior to the delivery of commodities for processing under such contracts. The distributing agency which enters into or approves a processing contract shall provide a copy of the contract and of these regulations to the processor, forward a copy to the appropriate FNSRO, and retain a copy for its files.

(n) *Performance reports.* (1) Processors shall be required to submit to distributing agencies monthly reports of performance under each processing contract. Performance reports shall be received no later than the final day of the month following the reporting period. The report shall include:

(i) A list of all recipient agencies purchasing end products under the contract and the number of units of end products delivered to each during the reporting period;

(ii) Donated-food inventory at the beginning of the reporting period;

(iii) Amount of donated foods received during the reporting period;

(iv) Number of units of approved end products delivered to eligible recipient agencies during the reporting period and the number of pounds of each donated food represented by these delivered end products;

(v) Donated-food inventory at the end of the reporting period.

(2) Distributing agencies shall review and analyze reports submitted by processors to insure that performance under each contract is in accordance with the provisions set forth in this section.

(o) *Inventory controls.* Distributing agencies shall monitor inventories to ensure that the quantity of donated foods for which a processor is accountable is the lowest cost-efficient level but in no event more than a six-month supply based on the processor's average monthly usage, unless a higher level has been specifically approved by the distributing agency on the basis of a written justification submitted by the processor. Under no circumstances should the amount of food ordered by the contracting agency be in excess of anticipated usage or beyond the processor's ability to accept and store

the food at any one time. Distributing agencies shall make no further distribution to processors whose inventories exceed these limits.

(p) *Processing inventory reports.* Distributing agencies shall submit to the FNS Regional Office not later than 60 days following the close of each Federal fiscal quarter a report showing separately for each processor under agreement with contracting agencies within the State:

(1) the donated-food inventory at the beginning of the previous quarter;

(2) amounts of donated foods received during the quarter;

(3) amounts of donated foods used during the quarter; and

(4) inventory at the close of the quarter.

(q) *Cooperation with administering agencies for child nutrition programs.* If the distributing agency which enters into or approves contracts for end products to be used in a child nutrition program does not also administer such program, it shall collaborate with the administering agency by (1) giving that agency an opportunity to review all such contracts to determine whether end products to be provided contribute to required nutritional standards for reimbursement under the applicable regulations for such program (7 CFR Parts 210, 220, 225, and 226) or are otherwise suitable for use in such program; (2) consult with that agency with regard to the labeling requirements for the end products; and (3) otherwise request technical assistance as needed from that agency.

(r) *FNS Regional Office review of contracts and inventory reports.* The FNS Regional Office shall (1) review all processing contracts and provide guidance, including written recommendations for termination, where necessary, to distributing agencies concerning any contracts which do not meet the requirements of this section, (2) allow distributing agencies 30 days to respond to any recommendation concerning contracts not meeting the requirements of this section, (3) review and analyze the processing inventory reports required by paragraph (p) of this section to insure that no additional donated foods shall be distributed to processors with excess inventories, and (4) assist distributing agencies in reducing such inventories.

(s) *Availability of copies of processing contracts.* Contracts entered into in accordance with this section are public records and FNS will provide copies of such contracts to any person upon request. The FNS Regional Office shall retain copies of processing contracts submitted by distributing agencies for a period of three years from the close of the fiscal year to which they pertain.

(t) *Processing activity guidance.* Distributing agencies shall develop and provide a processing manual or similar procedural material for guidance to contracting agencies, recipient agencies, and processors. The manual shall include, at a minimum, a copy of the standard form contract(s) and statements of the distribution agency's policies and procedures on (1) contract approval, (2) monitoring and review of processing activities, (3) recordkeeping and reporting requirements, (4) inventory controls, and (5) refund applications. This guidance material shall be provided to processors within 60 days of annual agreement approval by the State distributing agency. This material will also be provided to recipient agencies and contracting agencies within 60 days of approval of the annual agreement to receive donated commodities by the State and distributing agency.

Note.—The reporting requirements contained in this rule have been submitted to the Office of Management and Budget for approval under the Federal Reports Act of 1942.

Dated: August 7, 1981.

G. William Hoagland,

Administrator.

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